S. HRG. 100-527

OIL SHALE MINING CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES
DEVELOPMENT AND PRODUCTION

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

TO CONSIDER THE PROCESSING OF OIL SHALE MINING CLAIMS AND PATENTS BY THE DEPARTMENT OF THE INTERIOR UNDER THE MINING LAW OF 1872

OCTOBER 16, 1987

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OIL SHALE MINING CLAIMS

FRIDAY, OCTOBER 16, 1987

U.S. Senate,
Subcommittee on Mineral Resources
Development and Production,
Committee on Energy and Natural Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room SD-366, Dirksen Senate Office Building, Hon. John Melcher presiding.

OPENING STATEMENT OF HON. JOHN MELCHER, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator Melcher. The committee will come to order.

We are holding this hearing this morning to consider the reprocessing of oil shale mining claims and patents by the Department of the Interior under the Mining Law of 1872. I did say 1872. That is over 100 years ago, and the law is still in effect.

There has been about 50 years of litigation over oil shale mining claims, and then there was a highly controversial settlement last year on which Judge Finesilver gave a ruling. The Department of the Interior first said they were going to appeal and then backed out of appealing, so that ruling is in effect.

What the settlement did, the United States agreed to issue patents to people who had these claims for $2.50 per acre. The ones that were transferred in total amounted to $205,000 and covered 82,000 acres of land. You know, that shocks me and I believe it shocks the public that on the basis of the 1872 mining law, we are going to give away Federal lands at $2.50 an acre.

Nevertheless, you have to look at what that law says. If that is what the law says, then everybody is supposed to be happy or at least say, well, I guess they have a distinct advantage but we ought to change the law.

I am one of those who wonders whether the law was ever complied with. I am vaguely familiar with the 1872 Mining Act and familiar enough with it to know that in order to use that act to prove up on a mining claim, you have to have some work done every year. I am told it is $500 worth per year. It is $100 per year and $500 worth of labor and improvements per claim.

Well, it is pretty hard to demonstrate over the course of the time from when these claims were filed initially whether anybody did $100 worth of labor and improvements per year on each of their claims.

There is, however, a second point also. That is that under the law you have to have a valuable mineral and show, before you can get the patent, that you are going to produce it. How that could ever be demonstrated now, since nobody ever produces any oil out of oil shale, I do not understand. I do not understand Judge Finesilver's ruling, and I certainly do not understand the Department of the Interior's attitude on it, which I think is entirely wrong.

At any rate, to bring a halt to this, Congress said there will be a moratorium on issuing patents. That moratorium ends March 31, 1988. That is not too far off, and before that happens I think it would be wise and prudent for Congress to enact a new law to take care of what I believe is a very sad chapter in the history of the Department of the Interior in their treatment and disposal of the claims.

Senator Wirth.

STATEMENT OF HON. TIMOTHY E. WIRTH, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator WIRTH. Thank you very much, Mr. Chairman. I have a full statement which I hope we could have included in full in the record.

Senator MELCHER. It will be.

Senator WIRTH. I want to thank you for scheduling these hearings on oil shale claims in Colorado and other western states. We have been working on this issue for a long time it seems to me, well over a year, and we even joined with the Wildlife Federation in a lawsuit last September. I hope that we can make some more progress on this.

Let me point out that Congressman Campbell is here. We are delighted to have you here.

These hearings are just the latest chapter in the oil shale controversy. This is a controversy that never should have happened, and I think that this is one that demands action by the Congress right away.

As you pointed out Mr. Chairman, we discovered last year that hundreds of thousands of acres of land in Colorado, Utah and Wyoming are blanketed with oil shale claims that were filed nearly 70 years ago. Very few of these claims have ever been developed. In fact, in many cases the claimholders never even did their annual assessment work for years and years and years at a time. Today these claims are no closer to being developed as working mines than they were 70 years ago.

The Mining Law of 1872 was enacted to encourage the development of the Nation's mineral resources, not to permit companies to sit on claims in the hope that someday these mineral resources could be mined at a profit.

Our first witness, Congressman Campbell, has accurately labeled many of these claims for what they are, sheer speculation.

Last year, the Interior Department, as you pointed out Mr. Chairman, settled a lawsuit by selling 82,000 acres of public lands for $2.50 per acre. That decimal place is accurate, $2.50 per acre. Those are rock bottom prices for land underwater in Florida in the 1930s, I would suspect, rock bottom prices anywhere.

This is especially alarming for thousands of hunters and sportsmen and wildlife enthusiasts, since much of this land supports the largest mule deer herd in North America, a growing elk herd, and also provides important grazing land for ranchers on the western slope.

The Interior Department on that sad day, as you pointed out, Mr. Chairman, took that action over the strong objection of many members of Congress, including us, and despite the strong recommendation from their own lawyers in Colorado that the district court decision in the TOSCO case should be appealed.

The Interior Department just blinked, ducked and gave it away.

We are going to hear today that many of these claims have now been sold, but for more than $2.50 per acre. The State of Colorado is still trying to work out a deal to assure public access to these lands, so far without much success.

Last year, I described this as a fire sale. I thought the Department's decision was wrong, and I still think so. It is too late in the day to reopen that case, but it is not too late to make sure the Department does not hold any more fire sales. Once these hearings are behind us, I hope we can work together to draft strong legislation to protect the public's interest in these lands, not give it away; to protect the interests for hunting, fishing, hiking, and ranching.

Perhaps someday these oil shale deposits can be economically developed. We should give these claimants some incentives for developing these resources, but if they cannot do that, then these lands should be retained in public ownership and not given away and not held for the purposes of speculation.

I believe that that is what we intended when the Congress more than 60 years ago passed the mineral leasing law, and we should give a clear signal to the Department of the Interior that that is still the intent of Congress.

It was a sad day, as you pointed out, Mr. Chairman. You are absolutely correct, but it is going to be a good day when we can turn this around and stop this giveaway of public land.

Thank you, Mr. Chairman.

Senator **MELCHER**. Thank you, Senator Wirth.

Senators Wallop, Garn, and Armstrong, has asked that their statements be accepted for the record, and they will be accepted at this very point.

[The prepared statements of Senators Wirth, Wallop, Garn, and Armstrong follow:]

STATEMENT OF THE HONORABLE
TIMOTHY E. WIRTH

Oversight Hearings Regarding Oil Shale Mining Claims

October 16, 1987

Mr. Chairman, I want to thank you for scheduling these hearings on oil shale claims in Colorado, Utah, and Wyoming. You and I have been working on this issue for well over a year now, and slowly but surely we are making progress.

These hearings are just the latest chapter in a controversy that should never happened and which demands action by the Congress. Last August, we discovered that the Department of the Interior was planning to settle a lawsuit by selling 82,000 acres of public lands at the rock bottom price of $2.50. Those lands, all on the western slope in Colorado, provided winter and summer habitat for a growing elk herd and the largest mule deer herd in North America. That land was also used by several ranchers in my state, who rely on the public lands for their livelihoods. And these public lands were open to everyone for camping, hunting, and hiking.

Many of us in Congress, in both the House and Senate, tried to derail that agreement. As Congressmen Udall, Seiberling, Rahall, and I said in a letter to Secretary Hodel, while that settlement may have been legally defensible, it was morally wrong. As we said then, "its consequences go far beyond narrow issues of interpretation of the mining law; they extend to the basic principles of stewardship of public resources for the benefit of the public." Everything I have seen since then confirms that our judgment was accurate. As the Department's own lawyers strongly advised last year, the Department should have appealed the district court decision in the Tosco case. The Department should never have signed that agreement.

In response to that settlement, you and I, along with other members of Congress, tried to intervene in the lawsuit to force an evaluation of whether the settlement served the public interest. We also tried to enact legislation to halt the settlement for six months. Ultimately, we were unsuccessful and those lands passed forever into private hands. Since then, many of those lands have been resold to several major oil companies -- a result we all expected from the start.

We cannot turn back the clock and undo that settlement. But we can act to make sure that no more of the public lands are sold at fire-sale prices. We have made a good start. Working together, we successfully amended the Supplemental Appropriations bill in May to prohibit the Department of the Interior from issuing patents for almost all of the remaining oil shale claims. That action followed legislation that you introduced, and which I was pleased to cosponsor, to impose a moratorium on patenting of oil shale claims.

Once we have completed these hearings, our next step should be to draft legislation that permanently closes the loophole through which companies have been able to speculate in the value of oil shale for nearly 70 years. The Mining Law was never intended to permit companies to hold onto claims in the hope that someday those claims might be developed. Congressman Campbell has labeled that for what it is -- speculation.

The Congress has consistently stated that oil shale claimants must make improvements in the claims every year -- as part of a steady path to development of oil shale -- or lose those claims. That is the standard against which mining claims always have been tested. If neither the courts nor the Department will enforce what is a very clean congressional mandate, then it is time for Congress to step in.

Mr. Chairman, you have been a leader in protecting the public's interest in these lands. I look forward to working with you over the coming months in drafting good, strong legislation that closes this loophole and preserves these lands in public ownership.

STATEMENT OF SENATOR MALCOLM WALLOP

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

OVERSIGHT HEARING ON OIL SHALE

OCTOBER 16, 1987

MR. CHAIRMAN, THIS SENATOR IS HERE TO LISTEN THIS MORNING AND I'M GOING TO WAIT AND ASK SOME QUESTIONS OF THE WITNESSES, SO I WILL HOLD OFF ON MY COMMENTS ABOUT THE SUBSTANCE OF THIS HEARING.

I WOULD LIKE TO MAKE A BRIEF COMMENT ABOUT THE ENERGY COMMITTEE HEARING PROCEDURES. IT IS MY UNDERSTANDING THAT ACCORDING TO THE RULES OF THE ENERGY COMMITTEE, SPECIFICALLY RULE 4 (B) THAT: "EACH WITNESS WHO IS TO APPEAR BEFORE THE COMMITTEE OR ANY SUBCOMMITTEE SHALL FILE WITH THE COMMITTEE OR SUBCOMMITTEE, AT LEAST 24 HOURS IN ADVANCE OF THE HEARING A WRITTEN STATEMENT..." NOW, I KNOW THAT ALL RULES CAN BE STRETCHED TO ACCOMMODATE WHOEVER IS IN CHARGE OF INTERPRETING THOSE RULES, BUT BY NOT ADHERING TO THOSE RULES WE DO OURSELVES AN INJUSTICE FOR NOT BEING AS COMPLETELY PREPARED AS WE SHOULD BE, WE DO OUR WITNESSES AN INJUSTICE AND LIKEWISE OUR CONSTITUENTS. I WOULD, IN THE FUTURE, APPRECIATE HAVING THE COMMITTEE OR SUBCOMMITTEE TESTIMONY 24 HOURS IN ADVANCE, NOT 24 MINUTES OR A HALF AN HOUR BEFORE A HEARING IS SCHEDULED TO BEGIN.

I WOULD HOPE, SINCE THIS IS AN OVERSIGHT HEARING ON OIL SHALE, IT WILL BE KEPT TO THAT AND DISCUSSIONS RELATING TO PARTICULAR LEGISLATION WILL BE SAVED FOR ANOTHER DAY AND ANOTHER HEARING BEFORE ANY MARKUP IS CONSIDERED.

STATEMENT ON OIL SHALE
BY SENATOR JAKE GARN

Mr Chairman, I appreciate this opportunity to testify on the on the oil shale claim issue before your subcommittee today.

Let me say at the outset that I oppose the forced conversion of oil shale claims to leases under the Mineral Lands Leasing Act of 1920. I do not believe it is necessary nor is there is any economic evidence to support such action. Forced leasing is more a short-term political reaction to a perceived problem than a thoughtful long-term solution which effectively encourages economic development of shale oil on public lands. In fact, leasing does not guarantee development. It only guarantees more litigation from those claimants whose 5th Amendment Rights under the Constitution may be denied.

According to the Department of Interior, there are 732 active claims in Utah. Several Utah claimants will be harmed if such legislation is passed, unless it contains protections for prior existing rights.

I hope the Chairman would recognize that the rights of individual claimants must be protected. I have heard all of the horror stories about a $2.50 per acre giveaway in the recent settlement agreement between TOSCO and the Department of Interior. But, that is not what I'm talking about here. I am asking for equity for the little guy who holds a claim and has done his assessment work. Even a small company deserves as much. Any legislation should include a transition period so that claimants can patent their claims if they so desire. Regardless of which course the Chairman ultimately follows, I certainly will insist that whatever changes in the law are enacted are fair and equitable to shale claimants in my state.

I thank the Chairman for this opportunity to express my views and look forward to working with him to resolve this issue.

Senator William L. Armstrong (R-CO)

Subcommittee on Mineral Resources Development and Production

Committee on Energy and Natural Resources

United States Senate

October 16, 1987

Decades of oil shale claims litigation have sorely taxed the time, money and energy of private parties and the federal government. Court battles sap the spirit of those claimholders committed to developing oil shale when shale oil becomes economically attractive.

Congress gave certain rights to people who staked and maintained claims. To deny statutory rights retroactively, and -- without adequate notice -- prospectively, is morally wrong and legally indefensible.

Congress may address issues at the core of so much oil shale litigation, and change claimholder requirements of the 1872 Mining Law as amended by the Mineral Leasing Act of 1920. But, if Congress is to do this successfully, we must do so in a way that does not invite further litigation.

Senator MELCHER. Our first witness today is Representative Ben Nighthorse Campbell. He represents the Third District of Colorado.

Ben, we are delighted to have you here and delighted to have and welcome your advice on the best way to solve this situation.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, A U.S. REPRESENTATIVE FROM THE STATE OF COLORADO

Mr. CAMPBELL. Thank you, Mr. Chairman. I appreciate your indulgence and willingness to hold this hearing.

I have a statement for the record, but in the best interest of the short time schedule I would appreciate it if I could pick parts of that out, summarize it, and turn in the whole testimony for the record.

Senator MELCHER. Your whole prepared testimony will be part of the record.

Please proceed, Ben.

Mr. CAMPBELL. Thank you. I have made it a priority to prevent public lands from being transferred into private ownership under the guise of oil shale patents. As both you and Senator Wirth both mentioned, early in 1986 82,000 acres of oil shale claims in the Piceance Basin of Colorado were patented as a result of TOSCO versus Hodel and the Department of the Interior's negotiated settlement with the claimholders.

This extraordinary settlement, of course, got the attention of everybody in Colorado and in a broader sense, we believe, was an improper application of the provisions of the Mineral Leasing Act of 1920.

That 1920 Mineral Leasing Act was intended to promote the mining of oil shale lands, as we have also mentioned, but instead it has created tremendous opportunities for people to receive lands for a very low price, $2.50 an acre, sit on it and use it for speculative purposes.

If legislation is not passed before the Melcher-Wirth oil shale moratorium expires, an additional 273,000 acres in several western states will also be available for patenting for those purposes. The so-called claim owners will receive the land and are not obligated to produce oil shale or make any developments or improvements in any specified time period.

H.R. 1039 did pass in an over 3-to-1 margin with a very strong bipartisan support in the House this past June, and I believe it solves the oil shale controversy. It does so by implementing a leasing system rather than granting clear patents to oil shale claimholders.

In H.R. 1039, sponsored by Mining Subcommittee Chairman Rahall, it provides the holder of a valid oil shale claim with two options. The claimholder could elect to convert the valid claim to an oil shale lease or maintain the claim pursuant to the requirements of current law, provided that an amount be extended annually which represents a diligent effort toward the production of oil shale.

If the claimholder does not choose to comply with one of the options or the claim is found to be invalid, it would be canceled. This would enable serious claimants to continue mining and at the same time prevent speculation on that land.

Based on the United States geological survey map, officials have estimated that approximately 70 billion barrels of shale oil resources are contained in the 82,000 acres that we lost last year. Based on a recovery factor of 55 percent, there are 42 billion barrels of shale oil estimated to be recoverable. That is an amazing statistic considering the total proven reserves of crude oil in the United States amount to 28 billion barrels.

Based on an assumption that a government appeal of the TOSCO decision would have been successful and the lands would be leased rather than patented, bonus bids and royalty revenues could have eventually been collected. Patenting the claims yields only a filing fee of $2.50 per acre or about $200,000 for that 82,000 acres that were covered in the original settlement.

The most recent oil shale leases issued in Colorado and Utah by the Department of the Interior in 1974, however, brought bonus bids ranging from $8,000 to $41,000 per acre. The minimum royalty which was specified in two Colorado leases, CA and CB, was about 82 cents per barrel. This minimum royalty was established to entice companies into developing oil shale.

After oil shale becomes economical, however, the Secretary would then be expected to establish a royalty rate of 12.5 to 16.67 percent as specified in the Mineral Leasing Act. Apply an 82 cent minimum royalty and a 12.5-percent rate to the 42 billion barrel oil shale reserve, the potential of lost royalty revenue on the 82,000 that we did lose ranges between $42 billion and $210 billion of money lost to the American taxpayers as the owners of that land.

The patenting of mining claims denies the state and local governments revenues derived on bonus payments, guaranteed annual rent payments and royalty payments on production. Any property tax revenues that may be realized are minimal to the payments in lieu of taxes the counties in my district already receive.

In addition, ranchers with grazing permits have no assurances they will be able to continue to graze their stock at all on these leases once it is in private hands. On the claims that have been patented, ranchers must renegotiate with the new owners with no assurances at all.

I think in addition to that, the property values of the ranchers that have lost those leases will also be eroded. There is also no firm criteria about reasonable access for hunting or fishing, and there are many questions relating to public access.

I think if I might just summarize as a final statement, Mr. Chairman, in today's testimony I am sure you are going to hear from opponents of this potential legislation about how unfair it is to change the law or to disallow what I consider past abuses.

I would submit that when we speak of fairness, we should ask was it fair to deprive the public treasury of an estimated $210 billion of lost royalty revenue that would have been derived from that land? It was very certainly, in my estimation, given away.

I would also ask was it fair that some claim owners had not done any assessment improvement on those claims? A couple of them, in fact, have been tracked to have not done any improvement since 1945 and then got clear title and sold it for huge profits.

I would ask was it fair for the public for one estate to sell the 17,000 acres they got last year for $2.50 an acre to Shell Oil for $34 million? I think none of that is fair.

I know, as you do, Mr. Chairman, that we are often asked in government to judge an individual's perceived rights against the good of society. Although I have always believed in the individual's constitutional rights, there is no question in my mind that we cannot let any individual or group take advantage of the public for personal gain under the guise of personal rights.

That will conclude my testimony, Mr. Chairman, and I would be happy to try to answer anything if I can.

[The prepared statement of Mr. Campbell follows:]

STATEMENT OF CONGRESSMAN BEN NIGHTHORSE CAMPBELL
BEFORE THE SENATE ENERGY COMMITTEE
OCTOBER 16, 1987

As the new Congressman from Western Colorado, I have made it a priority to prevent public lands from being transferred into private ownership under the guise of oil shale patents.

In early 1986, 82,000 acres of oil shale claims in the Piceance Basin of Colorado were patented as a result of Tosco V. Hodel and the Department of the Interior's negotiated settlement with the claim holders. This extraordinary settlement was the result of the Department's failure to appeal the decision, and in a broader sense, the improper application of the provisions of the Mineral Lands Leasing Act of 1920.

The 1920's Mineral Lands Leasing Act was intended to promote the mining of oil shale lands, but instead has created opportunities for speculators to abuse the mining laws to receive title to public lands for $2.50 per acre.

If legislation is not passed before the Melcher-Wirth oil shale moratorium expires, an additional 1,677 claims covering 273,000 acres will be available for patenting purely for speculative purposes with no production criteria. The so-called "claim owners" who will receive the land are not obligated to produce oil shale or make any developments or improvements in any specified time period. In fact, the

Bureau of Land Management in June began to process patent applications for an additional 11,000 acres of public land immediately following the end of a self-imposed moratorium on oil shale patenting.

By rushing to give away an additional 11,000 acres based on the standards set out in the Tosco decision, it is apparent that the Bureau intends to vest property rights to the remaining claim holders even though the Congress is debating whether the original decision to settle Tosco V. Hodel was a betrayal of the public trust.

Legislation did pass the House in June that I believe solves the oil shale controversy by implementing a leasing system rather than granting patents to oil shale claim holders. The house legislation, HR 1039 sponsored by Mining Subcommittee Chairman Nick Rahall, provides the holder of a valid oil shale claim with two options: the claim holder could elect to convert the valid claim to an oil shale lease or maintain the claim pursuant to the requirements of current law provided that an amount be expended annually which represents a diligent effort toward the production of oil shale. If the claim holder does not choose to comply with one of these options, or the claim is found to be invalid, the claim would be cancelled.

The Congressional Budget Office, estimates the cost of implementing a leasing program, intended in the original law, at approximately $4 million. This amount seems insignificant compared to the value of the oil shale lands which the Department of the Interior has estimated to be worth $164 million.

I believe the decision to settle the Tosco case rather than appeal was solely a legal decision and that economics played no part in the decision. The only documents that have been made available to the Committees are the Regional Solicitor's brief and the Colorado State Bureau of Land Management Director's letters, which recommended appealing the Tosco decision.

Based on U.S. Geological Survey maps, officials have estimated that approximately 70 billion barrels of shale oil resource is contained in the disputed lands. Based on a recovery factor of 55 percent, 42 billion barrels of shale oil are estimated to be recoverable. This is an amazing statistic given that as of December 1985, the total proven reserves of crude oil in the U.S. only amount to 28 billion barrels.

Based on an assumption that a government appeal of the Tosco decision would have been successful, and the lands would be leased rather than patented, bonus bids and royalty revenues could eventually be collected. Patenting the claims yields only a filing fee of $2.50 an acre, or about $200,000 for the 82,000 acres covered by the original settlement. The most recent oil shale leases issued in Colorado and Utah by the department of the Interior were in 1974 and brought bonus bids ranging from $8,000 to $41,000 per acre. Officials in Colorado have advised me that a $2,000 bonus bid per acre is not unreasonable and using this conservative bid, bonus monies that the government could potentially receive for the 82,000 acres would amount to $164 million.

The minimum royalty which was specified in two Colorado leases, C-A and C-B, was about $.82 per barrel. This minimum royalty was established to entice companies into developing oil shale. However, after oil shale becomes economical, the secretary would be expected to establish a royalty rate of 12.5 or 16.67 percent specified in the Mineral Leasing Act. Applying $.82 minimum royalty and 12.5 percent rate to the 42 billion barrel oil shale reserve, potential lost royalty revenue would range from $34 billion to $210 billion.

The Committee must also bear in mind that since 1920, no oil from shale on existing claims has been produced for the commercial market. The record is incomplete as to whether the $100 annual assessment work per claim and the $500 total work pre-requisite for patents has been completed. The Secretary of the Interior must be directed to examine the validity of all existing unpatented oil shale claims. The claimants have had 66 years to patent the claims and to begin active oil shale mining and development. If no such action has been taken, the lands should remain in the public domain.

The patenting of mining claims denies to state and local governments revenues derived on bonus payments, guaranteed annual rent payments and royalty payments on production. Any property tax revenues that may be realized are minimal to the payments-in-lieu-of-taxes the counties in my district already receive.

In addition, ranchers with grazing permits have no assurances that they will continue to be able to graze their cattle on the patented lands once their existing permits have expired. On the claims that have been patented, ranchers must renegotiate with the new owners, with no assurance that grazing will continue to be permitted or at what cost. Property values on area ranches have also eroded, with many summer grazing pastures now under private ownership.

The claim has also been made that there will be reasonable access for hunting and fishing. However, many questions remain as to who will grant the access and who deserves the revenues.

In addition, questions remain about public rights of way for roads, communications, utilities, and preservation of wildlife. I fail to see how the privatization of public property will guarantee public access. I believe that public law needs to be amended to reflect its author's original intent: the promotion of oil shale mining, rather than the sale of public property at "bargain basement" prices.

Both the Mining Law of 1872 and the Mineral Leasing Act of 1920 were based on the theory that claims and mineral leases contain minerals of value and that those minerals should be diligently developed for the use and benefit of the nation. The claims in question have been held for 66 years and during that time no oil from shale on existing claims has been produced for the commercial market.

After more than half a century, it is not unreasonable to require that the conditions for developing a public resource emphasize diligent development rather than land speculation.

Private parties should not be rewarded for their lack of effort in developing a mineral resource by being granted a fee simple title not only to the subsurface minerals, but also to the surface resources. Congress has a responsibility to ensure that multiple use public lands, valuable for their wildlife, grazing, mineral, and recreational benefits, are not disposed of for the price of a six-pack of cheap beer.

Senator MELCHER. Ben, whatever we want to do in changing the law, I guess we look back at the commonsense of the Congress when they enacted the previous law and what the requirements were.

In H.R. 1039, which is a great step forward in saying that Congress must act and change the situation to protect the public interest, you use, I think, the phrase "all patent requirement."

By that, do you mean that in order to get a patent on a claim that you have to meet this test of showing that you have a valuable mineral and that it will be——

Mr. CAMPBELL. Actually, under the language of H.R. 1039, they could not get a patent. The two options were that they could change their claim to an open-ended lease or, if they were not keeping up with the annual assessments, they could be subject to losing the claim. There would be no clear patents to the land.

I, very frankly, do not have a problem with people getting clear title to the land if they want to pay the going rate for the land. From any number of sources out there, I have been told that the value of the land is between $500 an acre and $2,000 an acre; a pretty broad range but certainly a long way from $2.50 an acre.

It seems to me if the claimants want the land, if they want to buy it from the Federal Government for that amount of money and we could work something out to sell it to them, let them have it for fair market value.

My disagreement is with the fact that they are getting at least in some conditions, a good many conditions, in fact, for speculative purposes, using these old mining laws and just paying the patent fee of $2.50 and making a huge, huge profit on it. If they are going to speculate and make huge profits, it seems to me they should negotiate a settlement which is fair to the government by buying it at the going rate for land in that area.

Senator MELCHER. What do you mean by satisfying all patent requirements, meeting all patent requirements?

Mr. CAMPBELL. They get to a lease from their claim by applying to the Interior and keeping up the assessment, making annual assessments. They have to prove that they are, in fact, going to mine oil shale.

Senator MELCHER. Do they have to show the presence of a valuable mineral there? That is part of the patent requirement now.

Mr. CAMPBELL. Yes.

Senator MELCHER. Do they have to show the presence of a valuable mineral that can be marketed?

Mr. CAMPBELL. That is true.

Senator MELCHER. So they would have to demonstrate that.

Mr. CAMPBELL. Well, under the old mining laws, the way they got the claims in the first place was to actually try to mine oil shale. So if they are making progress toward that with annual assessment improvements and there was no oil shale under there anyway, then obviously they would lose it.

Senator MELCHER. I keep coming back to this point, how you are going to show that you can market something in the public interest when there isn't any market for it at whatever it costs to extract oil out of it. I do not see how the Department and Judge Finesilver got around that.

But be that as it may, the ball is in our corner now, Congress. And Congress has not been really very amenable to selling public land. When we let them have the coal lease, we do not sell the surface.

Mr. **Campbell**. Yes, I understand it. I am not an authority.

Senator **Melcher**. It is a valuable mineral. They extract it and put it on the market and it serves the public interest. That is what a public land law is based on, and the recovery of minerals from it.

Now just setting aside though whether it goes for sale or not, the surface, the question of meeting all the patent requirements. You do mean exactly that, that they show there is a valuable mineral there, namely oil, and that it can be marketed.

Mr. **Campbell**. Yes sir.

Senator **Melcher**. Thank you very much.

Senator Wirth.

Senator **Wirth**. Thank you Mr. Chairman. Thank you Congressman Campbell. Let me see if I could just review in the simplest terms what is going on here.

They got 80 some odd thousand acres of land.

Mr. **Campbell**. 82,000 in Colorado.

Senator **Wirth**. For $2.50 an acre. And that was about $200,000.

Mr. **Campbell**. Yes.

Senator **Wirth**. And they have turned around and sold that, or a good deal of that land?

Mr. **Campbell**. A certain amount has already been sold. One tract of 17,000 acres was sold for $34 million to Shell Oil.

Senator **Wirth**. And would you suggest the going value there was $2,000 an acre?

Mr. **Campbell**. It is a pretty broad range, and that ranges between $500 and $2,000.

Senator **Wirth**. So from the $200,000 an acre they paid the taxpayers, they sold part of it for $34 million.

Mr. **Campbell**. $34 million, yes sir.

Senator **Wirth**. And in the process they have potentially blocked access to that land for all of the wildlife, hunting, and sports.

Mr. **Campbell**. They could, since it is not spelled out in the agreement, the transfer agreement, no one knows. They say the agreement says they will have, that hunters, fishermen and so on, will have access, but nobody knows what that means. Is it limited just to the roads driving through it, or is unlimited access to wander where ever they want in the area as they could before as hunters. That is simply just not spelled out in the agreement.

Senator **Wirth**. So not only has the taxpayer been effectively taken for a ride in this fire sale, a lot of people who have been accustomed to using the land for grazing, hunting and so on can be kept off the land, and Interior has not attended to that, is that right?

Mr. **Campbell**. That is right. That is the way that I read it.

Senator **Wirth**. So it is a double hit. It is not only the $2.50, but as I understand it, it is a very valuable wildlife area too.

Mr. **Campbell**. Yes. I don't know of anybody who would sell their land for $2.50 an acre.

Senator **Wirth**. Now Interior claims that they had to do this because of a 1930 Supreme Court decision.

Mr. CAMPBELL. That is their claim, and I am sure that someone from Interior will explain their position, but I do not believe they had to do that at all.

I think that in the best interests of the public, that lawsuit should have been carried right to the very end, and not settled in the middle some where.

Senator WIRTH. Just to review that, what happened is that Interior claimed that under that 1930 lawsuit, they had to go ahead with the fire sale.

Mr. CAMPBELL. Yes.

Senator WIRTH. Now you and I have argued that this question was left open in that 1930 lawsuit, and in fact, the 1970 Supreme Court decision would argue that they should not give the land away. And Interior counters and comes back to us and says no, that is not what the 1970 Supreme Court decision said.

Mr. CAMPBELL. Some in Interior say that. I also know Interior attorneys who believe it should have been contested.

Senator WIRTH. Well to give them the benefit of the doubt, there appears to be ambiguity on both sides.

Mr. CAMPBELL. Yes.

Senator WIRTH. Given the ambiguity on both sides, one would think that you would resolve that ambiguity before you give away 82,000 acres at $2.50 an acre, which these guys did not do.

Mr. CAMPBELL. That is true.

Senator WIRTH. Now why did they not resolve that ambiguity before giving the land away?

Mr. CAMPBELL. We would have to let them answer that question, but I just think it was my own personal opinion, it was a bad mistake not to resolve that. I think their position was that it would cost more money to continue the litigation, and there was a possibility that they would lose anyway.

That is what I understand their position is. But I think that the land is so valuable, and in the best interests of the public who owns the land, it seems to me they should have made every effort to carry it right to the final decision.

Senator WIRTH. I think you are being nice when you say it was a bad decision. It think it was absolutely irresponsible stewardship. They have not been managing——

Mr. CAMPBELL. One thing for sure. That 82,000 acres are not coming back. That is gone. What we are trying to do is to prevent the rest of it, the other 273,000 or whatever from also going the same way.

Senator WIRTH. If we do not pass legislation now, there are hundreds of thousands more acres?

Mr. CAMPBELL. 273,000 according to my statistics, in Colorado, Wyoming, and Utah primarily.

Senator WIRTH. It seems to me that we ought to pass legislation, and in that legislation resolve this ambiguity. I will be charitable to the Interior Department and say it is ambiguous. I would argue that it is not, but let us be charitable about it, and say it is ambiguous, and let us resolve that ambiguity before giving away more land.

Mr. CAMPBELL. Yes. It is my understanding that the law pertaining to the Mineral Leasing Act is the only one that is written that way. The rest of them dealing with gold or coal and so on is very specific. But the ambiguities in that particular one has not been cleared up.

Senator WIRTH. You see, the only place where you and I differ, I would not even allow them to have this land at fair market value. I think that they have not complied with the mineral leasing act. I do not think they have done the appropriate assessment, and I think the public owns this land.

I would not go so far as to do that. If they want to get a lease on the land, and explore for oil shale or develop for oil shale, or develop oil and gas, they should do it just like anybody else does it on public land. Ownership of that public land remains with the public. I think you are being too nice to them.

Mr. CAMPBELL. Well, mining, I do not know if oil shale is ever going to come back. I have a hunch it will in time when the next big crunch comes around, as all the experts indicate. And my plan in this bill, actually this bill was my rewrite of Congressman Rahall's bill, and I did not want to prevent people from having the ability to mine.

And so I think this was really a pretty moderate kind of a bill. It does not prevent anybody from mining oil shale, and I think that is important. But at the same time, it does prevent them from tongue in cheek saying you are going to mine oil shale and then selling it for homesites or something.

Senator WIRTH. I would be all for them being able to explore and mine as well. But I would have them pay a royalty and pay it to the public, and not be able even to buy the land at a very low price. But that is a minor difference on the scale of one of the big land grabs of our time.

Mr. CAMPBELL. I understand. You know, the old mining laws were really to try to open the west and as they say, settle the wild west. Of course as you know, I have some ancestors who say it didn't get wild until some of the people came out there. I know the reason for it. But I do not think that you can put a law in place and leave it for 100 years.

Society changes, values change, interests change, the economy changes. Everything changes and then say, that that should still apply since it was in effect 100 years ago. If we still abided by all the laws that were in effect 100 years ago, certainly women wouldn't have the right to vote and there would be a lot of things that would create some tremendous problems.

It seems to me that laws are changed to reflect the needs of the society that is moving ahead. And this one certainly has not.

Senator WIRTH. Well I thank you for your strong advocacy in this area.

Mr. CAMPBELL. Well I do not know where that painting went. I think somebody said it went to the barber shop.

Thank you, Mr. Chairman.

Senator WALLOP. Mr. Chairman, Senator Ford was here before me on behalf of the committee.

Senator FORD. I am a little bit confused. Being confused is not unusual for me, but I find that we have a protracted effort to give away as much of the government as we possibly can. We have given away National and Dulles Airports. We now find that the property that was taken under mortgages, loans with the federal government is being disposed of in somewhat of a questionable manner.

Now we get to the point where land that is $2.50 an acre is sold for roughly $2,000 an acre. Instead of carrying it on out, we stop in the middle of the stream and say hey, we want to get rid of all of it, and here we go.

It seems a pattern, and it is going to be difficult in my opinion to stop the pattern unless we can get some kind of action by the Congress. What is the date? Is there, and I ask this of my colleagues, is there a date that stops all of this? Is it retroactive?

Mr. CAMPBELL. No, sir.

Senator FORD. Well when is the last land sale?

Mr. CAMPBELL. Let me just look at my notes here.

Senator FORD. There was a moratorium effective last March?

Mr. CAMPBELL. Yes. The moratorium, well I do not have written when the Melcher-Worth moratorium expires.

Senator MELCHER. The end of March, next spring.

Senator FORD. So the moratorium goes until March 1988, and then if you enact this piece of legislation, that prevents leasing in the future, except under certain circumstances provided they find valuable resources?

Mr. CAMPBELL. Even if they find the resources sir, they can convert their claim to a lease, an open ended lease and kept it forever to mine if they want. But they can not get clear title to it.

Senator FORD. Can not get clear title?

Mr. CAMPBELL. That is right, under H.R. 1039.

Senator FORD. What I was concerned about, and that is the reason I was trying to read the bill, these little things are floating around while all the big things are going on, you know we begin to look back over our shoulder and someone is eating all of our food.

I was trying to put a date to make it retroactive, so that there would not be any problem. But we do have until March of next year as it relates to the moratorium. That eases my pain a little bit.

Mr. CAMPBELL. There was some discussion about putting a retroactive date in the bill, but we decided it would create more problems through litigation than it solved. So the land that is already gone has been transferred to private ownership, is gone.

Senator FORD. About $200,000 was paid for the land that was worth $34 million? I would get out of government for profit like that, wouldn't you?

Thank you Mr. Chairman. Dan, I appreciate what you are trying to do.

Senator MELCHER. Senator Wallop.

Senator WALLOP. Mr. Chairman, let me begin with an observation, and that is that in your statement Congressman, there is a certain implication that is belied by the facts.

You talk about rushing to give away additional 11,000 acres and the BLM began to process patent applications. Those 11,000 acres, were they not specifically exempted from the Supplemental moratorium, specifically exempted?

Mr. CAMPBELL. I cannot, I do not know.

Senator **Wallop**. Well let me assure you that they were, and it was Congress' intent, not the Bureau's guile that made those patent applications begin.

Let me just make another observation. You said quite correctly that if we were bound by all the laws of a hundred years ago, women still would not have rights and other things. But in those instances we changed the law. Now, the law does in America, thank god, vest Americans with certain rights. Those are the rights that are created by the law. And if the law is wrong, and if Congress has been slow to change the law, how about blaming the Congress instead of the Secretary for upholding the rights of Americans under the law?

Mr. **Campbell**. Well in my opinion the Secretary could have had that choice of letting Congress have a little more time to decide if the law had been changed before.

Senator **Wallop**. The Secretary was under certain court direction to behave. Even the Secretary is not permitted to thumb his nose at the direction of the court in this country. So I am saying that it is neat to sit around and do some Hodel-bashing, but in fact it is Congress which has been sloth, not the Secretary.

If we change the law, well and good. But some would say that even under the legislation you would propose that the fact that oil shale holders, claim holders would be required to convert their claims to leases. Some would say, and I think you will have to answer, this would constitute a taking under the fifth amendment of the Constitution of the United States.

Mr. **Campbell**. I have heard that.

Senator **Wallop**. And if it is, then in fact the Secretary has been correct and the courts have been correct. And so I am just saying that it does not do any good to address the problem by bashing somebody when it is our own fault.

Senator **Wirth**. Will the Senator yield?

Senator **Wallop**. If the Secretary upholds the law, there is plenty damned good reason for me to believe that there still is some strength in this country.

Senator **Wirth**. A couple of factual matters on the 11,000 acres that Congressman Campbell was referring to. I believe that the legislation says that the Interior Department can go ahead and process those 11,000 acres, and that was the compromise that the Senator from Wyoming and I worked out.

It did not preclude the Congress from ultimately going back and not allowing those 11,000 acres——

Senator **Wallop**. I am only talking about the words in the statement which imply some kind of malfeasance on the part of the Department. It says, began the process, patent applications for an additional 11,000 acres immediately following the end of the self-imposed moratorium, by rushing to give away an additional 11,000 acres. There is no such thing going on here.

All I am trying to say is that it is more appropriate to say what is the case, rather than to state another one which raises alarms which are not justified.

Senator **Wirth**. Well I do not think that there is any doubt in the legislation as to what Congressman Campbell said could be an absolutely valid interpretation. The Interior Department can go fast on those 11,000 acres, and really in my opinion thumb its nose at the whole issue. Or it can slow down and say, Congress, you resolve the issue.

Which is the second point, I think, that is at issue in the discussion here. The Secretary, as I understand it was not ordered by the court to do anything.

Mr. **Campbell**. Yes.

Senator **Wirth**. There are two ambiguous interpretations from the Supreme Court, one written in 1930 and the other written in 1970. Now one can read either one of those as you want. But the Interior Department's lawyer in Colorado, their own lawyer out there said this is ambiguous and we ought to appeal this before making a decision.

There was not an order on this, she said we ought to appeal it before making a decision. That is what we would argue Senator Wallop. It was not a matter of taking or right or wrong. Let us resolve this ambiguity and do it before we get into a situation of more thousands of acres at $2.50 an acre.

Senator **Wallop**. Let me just read you the language in the Supplemental, because it does not in any way suggest a slowing down or anything else. It simply says "None of the funds in this and other acts should be available prior to March 31st to issue a patent for oil shale mining claim located prior to enactment of the Mineral Lands Leasing Act of 1920, as provided for under the General Mining Law of 1872, except for patent applications," and they list several numbers.

There is no indication in there that Congress said stop or any other thing.

Senator **Wirth**. You and I wrote that language, deliberated over it very, very carefully so that we would not get into any possible taking provisions. The Interior Department then can manage that in any way they want. And what they have decided to do is, as Congressman Campbell has said, what they have decided to do is to go full steam ahead rather than waiting.

Now they can manage that law any way they want. What I am suggesting and I think, I will not speak for Congressman Campbell, but that we are in a situation here where the Interior Department has the discretion as to how rapidly they want to do that.

Mr. **Campbell**. That is also my opinion, yes sir.

Senator **Melcher**. Well Senator Wallop, I think that you are absolutely right. Congress should have intervened and should have adopted different statutes a long time ago. After all, this did go to the Supreme Court in 1970. And the Supreme Court upheld the Department of the Interior and said that they were proper.

The Court said that they were proper contrary to what the District Court and appellate court had said, that the Department of Interior was proper in saying that the claims are invalid for lack of assessment work or otherwise.

Since 1970, Congress should have acted. You know there are a lot of different Secretaries of Agriculture or Interior involved in this from both parties. And to think that somehow you just led them to their best judgment, which in this case has been flakey judgment, and not pursuing adequately that 1970 case when they won, and then going ahead and suggesting to Congress that they needed additional statue, coming up here and proposing it. They bat it around in their inner workings at the Department.

Those attorneys that felt like they had won in 1970 and ought to pursue it vigorously did not surface to the top. The people who had worked diligently in the bureaucracy sometimes for their entire working career were ignored in how the claims should be processed. And we came up to the case that was decided by Judge Finesilver, I think incorrectly presented by the Department of the Interior.

I understand that the judge is an excellent jurist, and based on the case as it was presented there probably should be no criticism of his finding. But I will criticize how the case was presented on behalf of the Department of the Interior, and I will criticize the Department of the Interior in holding down within the Department those people that thought this was an absolute outrage and caving in to presenting a bad case, an inadequate case, and caving in above all not to appeal that case when judges and the bureaucracy could have responded in the public interest.

Now there is plenty of blame to go around, but it is time that we acted. And I hope that there will be no opposition when we do act in this Committee and on this Senate floor to enact legislation to straighten out this chaotic mess.

Senator WIRTH. Just to make sure that we all understand that when the Department of the Interior acted in 1970 and the Court acted in 1970, Interior was on, let's put it this way, on our side in 1970. They were on the public's side. And the Interior, I think that the general counsel at that point, the Solicitor for the Interior was Ted Stevens, is that not right, was he at that point the Solicitor of the Interior?

Senator MELCHER. He was one of them.

Senator WIRTH. Apparently Judge Finesilver is a fine judge and I think he had in this whole process, he was presented with a lousy package of arguments by the Department of the Interior.

Senator WALLOP. Are you saying our colleague Senator Stevens was inadequate?

Senator MELCHER. No, they won in 1970.

Senator WALLOP. No, they did not.

Senator MELCHER. I am going to read for the record, "The saving clause of the mineral leasing act makes the United States the beneficiary of all claims that are invalid for lack of assessment work or otherwise and the Department of Interior had subject matter jurisdiction to determine whether respondent's claims were maintained within the meaning of the clause, including the performance of adequate assessment work. Krushnic Supra and Virginia Colorado Supra, must be confined to situations where they has been substantial compliance with the assessment work. Reversed and remanded."

Now that was 1970, the decision of December 8th of that year by the Supreme Court. The Interior was in a good position on that particular case.

Senator WIRTH. John, just let me say for the record that I was mistaken. Ted Stevens was Solicitor of the Interior in the late Eisenhower years. But at that point he also was urging the Department to challenge these oil shale claims. He was doing precisely that in the 1950's.

Senator **Melcher**. You are precisely correct on Senator Ted Steven's position when he was with the Department. He was not with them in 1970, however.

Senator **Wallop**. In the meantime, Congress slept.

Senator **Melcher**. Admitted. We are awake now. And I trust we will not have any problem in passing legislation in straightening this out.

Thank you very much Ben, for coming over.

Our next witness is Jim Cason, Deputy Assistant Secretary for Land and Minerals Management, Department of the Interior.

STATEMENT OF JAMES E. CASON, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. **Cason**. Thank you, Mr. Chairman. I believe that we supplied our testimony last night, and I would just like to have it entered into the record.

Senator **Melcher**. It will be made part of the record in its entirety. And please proceed however you choose.

Mr. **Cason**. What I would like to do is to cover some of the high spots. I appreciate the opportunity to be here today to comment on and discuss the oil shale issue that has been facing the Department of the Interior for almost 70 years.

After listening to the first witness and the discussion that has ensued, I am sure this discussion will be even more popular before we get finished. The issue of oil shale boils down into two principal categories. The issues are, how does the Department of the Interior under the law treat the assessment criteria and resumption standard that are in the law.

Secondly, how do we deal with the issue of discovery. All other things are minor compared to those two basic issues. I have heard some commentary here that the Department of the Interior has been rushing to patent in an effort to give away Federal land over time. And I have to say that the history of the oil shale issue differs with that.

You will find in reviewing the history of this issue that after the passage of the 1920 Mineral Leasing Act, one of the first things that the Department of the Interior did was begin to challenge mining claims and try to invalidate them.

In 1927 a Supreme Court decision, *Freeman* v. *Summers*, instructed the Department of the Interior that what we were doing was not consistent with Federal law at that point in time and overturned the Department's efforts. We went through another series of invalidating claims that resulted in Supreme Court decisions in 1930 and 1935.

In 1935 the Department informed the public that we were no longer going to try to challenge claims on the basis of assessment, and it informed the public what kind of standards we would use for the discovery. Between 1935 and 1960 the Department of the Interior patented 350,000 acres of oil shale claims under those standards.

In 1961 we started the new round of discussions on this issue. Again, the Department of the Interior tried to overturn the historic precedent set in oil shale legislation. At that time we went through extensive notification of the public through lawsuits that we were going to try to overturn the procedures on assessment and also on discovery, which engendered a couple of other Supreme Court decisions.

Again, the Department of the Interior was instructed that the original standards that had been applied during 1935 and 1960 were in fact the standards that should be applied by the Federal Government and that the early interpretations had been accurate. So Mr. Chairman, I would have to tell you that there has been no rush to judgment, that the Department of the Interior has acted a number of times over time to try to overturn those standards or to readdress them to no avail.

Secondly, I think it is pertinent to know that the Congress of the United States has not been immune to notification on this process. In fact there were hearings in 1931 at which Congress was apprised of the two basic issues of assessment and discovery and after the Congress considered those issues the Department of the Interior was informed by the committee chairman, Senator Nye, to proceed with issuing patents—that the Congress could see no reason not to issue patents under the standards of the day.

That is what precipitated the issuance of 350,000 acres worth of patents. Also, I learned by reading testimony given last year by John Savage who will testify later, that during 1937 to 1943 the Department of the Interior again brought this issue up to Congress and asked Congress to address the issue. During that time Congress held hearings and did not change the law.

The bottom line of this Mr. Chairman, is that for the last 70 years the Judicial Branch, the Executive Branch, and the Legislative Branch of this government have created an expectation on the part of all mining claimants as to what they should expect under the law. At this point in time, we used that expectation to make the settlement in TOSCO which has raised so many concerns.

Now there is another point that is important in dealing with the TOSCO settlement.

Senator **Melcher**. Mr. Cason, before you get beyond where you are at right now, I want to be sure that I understand what you are saying.

You said 1931, the Department of the Interior suggested that there was a problem and maybe Congress should do something about it. And Senator Nye said well go ahead and issue patents. And then what was the next time the Department said something?

Mr. **Cason**. 1937 and 1943.

Senator **Melcher**. 1937 and 1943. Am I to conclude that you are now going to go on and give us a more recent time?

Mr. **Cason**. The most recent time that it came to the attention of Congress and was focused on was with the TOSCO settlement.

Senator **Melcher**. I understand that. But you know I have been here since 1969, in the House first and then over here. And I know what the general attitude was in the solicitor's office during that period of time. And most people in the solicitor's office in the early 1970's said that after this case was decided in December 1970, that there was not any doubt that you had to prove that you had done the assessment work and that the, for lack of proof of doing the assessment work, the claim reverted to the United States.

Now you understand that too, I am sure.

Mr. CASON. No, I do not. As a matter of fact Mr. Chairman, what I understand from that case is that the Supreme Court refused to rule on the substance of the matter and they only remarked on venue. And what they did is remanded it back down to lower courts to determine what the substance of the matter was.

Senator MELCHER. That is absolutely right. But you do understand what the Court said in the language that I just read to you, which is only one or two sentences.

Mr. CASON. Yes, I heard that.

Senator MELCHER. Which said, that if the work had not been done, that the claim then reverted to the United States.

Mr. CASON. I understand that language Mr. Chairman. And what precipitated—

Senator MELCHER. Let me go on and then we will get to your point.

My understanding during the 1970's, perhaps even during the early 1980's or until TOSCO was decided was that people, professionals in the Department of the Interior were hanging their hat on the fact that the Department was on top of it. And that the decision made in Colorado should have been appealed and it was intended to appeal.

Now during this 18 years, and I am not absolving myself from blame, during that 18 years, Congress was sort of lulled into thinking well, this may not be all that clear. But the Department of the Interior through the solicitor's office is pursuing it and the public interest will be protected.

Now that is from one who was here. That was my view and I fully admit that it was mixed up enough that Congress should have acted and clarified it. And I interpret your final paragraph here second from the last to be that if the Department of the Interior's position and the Administration's position now, when you say you look forward to working with Congress to arrive at an acceptable solution to this long term problem, which solution could include legislation.

Mr. CASON. Yes, it could.

Senator MELCHER. Please proceed.

Mr. CASON. Thank you. The point that I am trying to make about Congress is not to place blame anywhere, but to establish the fact that we in the government have created an expectation on the part of the claimants of the rules they had to play by in order to get a patent. That is the only point.

One could also conclude, because of the inactivity of Congress with the issue facing them over time, that Congress was acquiescing to the status quo and that claimants could rely on the position of the government during those periods of time. That is the point that I am trying to make.

Senator MELCHER. Were you trying to say in *Hickel,* the 1970 case, that it was not decided by the Supreme Court on the merits? Of course it was remanded.

Mr. CASON. It was remanded.

Senator MELCHER. The Court decided on the merits, did they not, in favor of Hickel?

Mr. CASON. No, I believe in the *Hickel* case, the Court remanded the issues down to lower courts for them to decide what the substance of the matter was. And what that precipitated was administrative hearings that began with the Department of the Interior once again——

Senator MELCHER. Mr. Cason, you are not trying to tell us that your understanding of the *Hickel* case of 1970 was that the Court did not rule on the law, or are you? Are you trying to tell us that the Court did not rule on the substance of the law?

Mr. CASON. It is my understanding that the only substance that they ruled on was on the issue of assessment. And they said that in fact the Department of the Interior could challenge on the basis of assessment to determine if substantial compliance with the law had occurred. Now that is accurate.

Senator MELCHER. We understand it correctly then. It was a substantive decision. Do you want to admit that to me, or not? How many cases, which cases would the Court remand? They remand them all. So you will concede to this horse doctor, even though I am not an attorney that what the Court did in 1970 was to rule on the substance of the law in favor of Hickel, the Department of the Interior.

Mr. CASON. I would agree with you, sir, that the Court ruled that we could challenge on the basis of assessment, but it gave no parameters on what that meant. And it remanded down to lower courts to determine what——

Senator MELCHER. So substantial compliance with the law, and if you wanted to ask me which law, the law of assessment. I do not know how you can not, you know, I do not know when you win, I do not know why anybody from the Department of the Interior would come forward and say we have a problem with winning.

Senator WALLOP. Hold down here a minute and let us look at what did take place. It put the ruling back down to the district court. The district court ruled with the claimants. They substantiated the requirement for assessment work, and when that assessment work went back to the Court, the Court said that the claimants were right, not the government. That is precisely what Mr. Cason is trying to tell you. Even as a horse doctor, that is a fair judgment of what took place.

Senator MELCHER. And as a horse doctor I also know what took place. Then announced that they would appeal and then they refused to appeal. Now that is what did it.

Senator WALLOP. That was just the TOSCO thing, and that was totally independent from Hickel.

Senator MELCHER. It was not.

Mr. CASON. I thought this would generate debate.

Senator MELCHER. All I want out of you Mr. Cason, is the second from the last paragraph, and I want to be sure that that is the Department's attitude and that is the Administration's attitude that you will work with Congress on solving that. And one way of working with Congress, the easiest way of working with Congress and solving it is through legislative correction.

Mr. **Cason**. There is no question that what we said there at the end of testimony is accurate. We are willing to work with Congress to come up with an equitable solution to the problem.

Senator **Melcher**. Which does include legislation?

Mr. **Cason**. It very well may include legislation. I would have to say, Mr. Chairman, that the legislation that we have seen thus far does not meet the test that we believe demands equity. There were some comments here on H.R. 1039 that we vociferously oppose that legislation because it takes away from the bundle of rights that the claimants may have acquired over time.

In any discussion that we will have with the Congress, one of the prime things that we will be looking for is to ensure that the past equities and the past vested rights that have been acquired by the claimants are protected. And we have no problem beyond that point.

There have been several discussions about how one might change the rules of the game. I think that it is important to note as one goes through the discussion that each one of the changes of the rules that have applied over the last 70 years and changes in expectations that the claimant should be able to rely upon, has the potential of constitutional takings. And it is our feeling within the Department of the Interior that we may be into compensable takings, and what we will do is change the issue before the court from what rights do the claimants have, to how much should we pay the claimants when we take those rights away.

So we would like to end up with a situation that reduces the possibility for long-term litigation and actually provides a clear certainty on the part of all parties as to what we should do.

[The prepared statement of Mr. Cason follows:]

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STATEMENT OF JAMES E. CASON, DEPUTY ASSISTANT SECRETARY, LAND AND MINERALS MANAGEMENT, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION, COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, CONCERNING OIL SHALE MINING CLAIMS ON PUBLIC LANDS.

I appreciate the opportunity to appear before the Subcommittee today to discuss oil shale mining claims on public lands. We are pleased that the Subcommittee has convened this hearing. We have been conducting meetings and briefings with Congressional staffs in an effort to solicit suggestions to arriving at a consensus approach to the future management of oil shale mining claims.

Oil shale mining claims have presented the Department of the Interior with some very difficult problems. These problems have eluded solution for 67 years. Although the mining claims have been in existence for nearly 70 years, policy debates and litigation have prevented the Department from taking final action on a significant number of them. Basically, the history of the oil shale mining claims has been the history of the Department, Congress, and the courts wrestling with two basic questions: What constitutes assessment work on an oil shale mining claim and what constitutes a discovery of a valuable deposit of oil shale? I will review that history briefly in the context of five key elements of the mining law. Those elements are discovery, location, recordation, assessment and patent.

Discovery

The discovery of a valuable deposit of minerals is the most fundamental aspect of the mining law. Without discovery, there is no interest in the land.

The history of the discovery standard as it applies to oil shale claims, dates back to the enactment of the Mineral Lands Leasing Act of 1920. In congressional debates on that Act, oil shale was specifically identified as a locatable mineral to which the savings clause preserving patentable claims would apply. The Supreme Court, when discussing these debates in its 1980 Andrus v. Shell Oil decision, concluded that the fact that oil shale had no commercial value in 1920 was not viewed as an obstacle to receiving a patent.

During the 1920's the Department patented oil shale claims in lands located in the Green River Formation, where there was some oil shale at the surface, leading to the inference that richer deposits were present at depth. This standard was delineated in a 1927 Departmental decision, Freeman v. Summers.

Not surprisingly this standard met with controversy. However, after the Senate Committee on Public Lands and Surveys, in 1931, examined the Departmental discovery standard as set out in Freeman v. Summers, the Committee Chairman, Senator Nye, advised the Department to proceed with patenting under this standard. From 1931 to 1960, the Department followed this policy. Five hundred twenty-three patents covering almost 350,000 acres were issued during this period.

In 1961 the Department tried to impose a more restrictive discovery standard placing emphasis on the present profitability of producing oil shale. This more restrictive discovery standard was rejected in 1980 by the Supreme Court in Andrus v. Shell Oil Co. and the Department had to apply the much less restrictive standard, that is, that a showing of oil shale on the surface leads to an inference of more at depth as set out in Freeman v. Summers.

Because of the continuing controversy over establishing a proper standard for discovery as it relates to oil shale, the Department convened a task force to evaluate alternative standards and to make a recommendation. The proposed discovery standards are summarized in a task force report to the BLM Director. The results will be incorporated into an anticipated rulemaking to obtain the widest possible public review. Generally we will only inquire into the discovery of a valuable deposit on the mining claims once a patent application has been filed.

Basically, a discovery will be shown to exist in Colorado and Utah wherever:

- an outcrop of the Parachute Creek Member of the Green River Formation occurs within the confines of an oil shale mining claim in the Piceance or Uintah basins; or

- Lacking such outcrop, an exposure of a tongue of marlstone, located within the confines of the claim that yields not less than 3 gallons of shale oil per ton of rock upon destructive distillation, can be reasonably used to infer the existence of the Parachute Creek Member at a shallow depth of less than or equal to 300 feet.

In Wyoming the geology within the areas containing the remaining oil shale claims, the Fossil Butte and Green River basins, differs from that of the Piceance basin. Though not strictly similar to the geology of Freeman's claims, the Department patented oil shale claims in Wyoming, both before and after the Freeman decision, that were located upon the as-then-mapped Laney Member of the Green River Formation, now subdivided into two members. We propose to accept pre-1920 exposures of this unit, or its correlatives, as establishing discovery where the sampled marlstone yields shale oil quantities of the same magnitude as that already patented in Wyoming, approximately 15 gallons per ton.

Location

The act of marking the boundaries of a mining claim on unappropriated land open to entry establishes the claimant's bona fide interest in the mineral deposit. Since the majority of the oil shale mining claims were established almost 70 years ago, the Department only has direct knowledge of the availability of the land at the time of entry. The Department has evaluated all of the remaining oil shale mining claims in an effort to identify and void those claims located when the lands were closed to entry. At this point only four of the claims were found to be located on lands closed to entry. We will presume all other acts of the claimants are proper unless we are presented with evidence by a third party who may protest during the patenting of a mining claim. The protestor and the claimant will be required to settle the matter in a proper court before we will continue any further actions on the patent application. This process applies to all mineral patent applications, regardless of the mineral commodity.

Recordation

Recordation represents the initial filing of a notice of a claimant's interest in a valuable deposit within the limits of a mining claim and the annual filing of affidavits of labor. Historically these filings were made only with the county. Following the passage of FLPMA, the requirement to file a notice of location and to make annual filings of annual labor was expanded to include a filing of both documents with BLM.

Failure to make the initial filing with BLM voids the claim. Any oil shale mining claims not filed initially, as required, on October 22, 1979, ceased to exist as of that date. Annual filings are monitored by BLM and any lapse conclusively voids the claim. The Department has voided 166 oil shale mining claims this year for failure to make the proper annual filings.

Assessment Work

The obligation to perform assessment work has been one of the two major controversies associated with the management of oil shale mining claims since the passage of the Mineral Lands Leasing Act of 1920. The savings clause of the Act required oil shale mining claims to be maintained in substantial compliance with the mining laws. Under the mining laws, to hold a claim, a claimant must perform at least $100 worth of assessment work each year. Failure to perform this labor could result in the relocation of the claim by rivals, unless labor is resumed first. This last proviso is called the resumption doctrine and serves to bar adverse actions against the claim.

In the 1920's and early 1930's, the Department contested a number of oil shale mining claims for failure to do assessment work. These contests resulted in two Supreme Court decisions adverse to the Department. The first, Wilbur v. Krushnic, decided in 1930, held that the government was barred from contesting a mining claim for failure to perform annual assessment work as long as the claimant resumed performance prior to the contest. The second, Ickes v. Virginia-Colorado Development Co., decided in 1935, held that the government could not contest the claims for failure to perform assessment work. As a result of these adverse court decisions, the Department reversed its decisions invalidating claims for lack of assessment work, and from 1935 to the early 1960's, issued patents to approximately 350,000 acres of land regardless of whether assessment work was done using the Freeman v. Summers discovery standard.

After reconsidering its policy, the Department began rejecting patent applications for oil shale claims that had been deemed invalid due to lack of assessment. Plaintiffs in the recent TOSCO litigation challenged, in part, decisions invalidating their claims under this policy. These plaintiffs first brought suit which resulted in a District Court decision in 1966 that the Department lacked authority to contest the claims for lack of assessment work; this decision was affirmed by the Court of Appeals in 1969; and in 1970 the case came before the Supreme Court. The Supreme Court, in Hickel v. TOSCO, held that the Department could contest claims where a claimant failed to "substantially comply" with the assessment work requirement, remanding the case to the District Court. In 1972 the Department promulgated rules incorporating the concepts of the decision. In 1973, the District Court again found for the claimants, holding that the Department was estopped from reopening the issue of failure to perform assessment work on these claims. The Court of Appeals set this decision aside and remanded the case for administrative proceedings on all issues, not just estoppel.

In administrative proceedings in the late 1970's and early 1980's the Department found almost all the claims invalid. It was these findings that were overturned in the District Court decision TOSCO v. Hodel, made by Judge Finesilver. In that decision, the Department's assessment work arguments were rejected by the Court. The Court accepted the claimant's four defenses against challenges to assessment work:

- First, the government was estopped by its past practice of patenting oil shale mining claims without regard to assessment work;
- Second, the claimant's compliance with the assessment work was found to be substantial;
- Third, resumption of work barred the government's challenge; and
- Last, a total of $500 of annual labor satisfied the obligation completely.

To overturn the decision would have required the government to be successful on appeal on all four defenses. A victory by the claimants on any single defense would doom the government's efforts. The possible long-term effects of that decision led the Department to settle the case rather than continue the seemingly endless court battles with a possible loss on appeal that could have effectively ended any future Departmental options for dealing with the remaining oil shale mining claims. The Tenth Circuit Court of Appeals order to the District Court mooted Tosco v. Hodel with orders to the District Court to set aside the administrative decisions of the Department that led to the case.

Briefly the Department's proposed standard for substantial compliance with the assessment work requirement can be summarized as follows:

o For the period from 1935 to 1972 lapses in assessment are not a sufficient basis to void a claim.

o For the period from 1972 to the present and for all future filings, the minimum ($100 or more) annual expenditure of labor or means in an effort to develop a valuable oil shale deposit, without lapse of two or more years duration. Resumption of assessment work or expenditures of labor or means prior to the initiation of a government contest alleging failure to substantially comply with assessment work requirements are an absolute defense against such allegation. (resumption doctrine)

- A minimum threshold for patent requires at least $500 worth of assessment work. Meeting this threshold does not relieve the claimant of any responsibility to perform annual assessment work each year.

Equity demands that the Department not inquire into performance of assessment work before the 1972 publication of a regulation (43 CFR 3851.3[a]) that alerted all mining claimants that their claims were subject to cancellation for failure to substantially comply with this obligation. For the period before 1972, claimants should be able to rely upon the Secretary's 1935 holding in The Shale Oil Co. that the Department would not bring contest on the basis of nonperformance of labor.

Since 1972, the Department has contested claims because of nonperformance of annual assessment work, subject to the constraint of the resumption doctrine. The law (30 U.S.C. 28) provides that contest or relocations must happen while the claimant is in default of his annual obligation in order to effect a forfeiture of rights. The Department must initiate contest action before a mining claimant resumes his labor or be barred from contesting the claim on this basis. In other words, as the Supreme Court held in Wilbur v. Krushnic (1930), the Government may not take advantage of a past lapse of assessment work.

The Department will accept the affidavits of assessment work filed annually since 1979 under section 314 of the Federal Land Policy and Management Act (FLPMA) as factual unless compelling evidence to the contrary is presented. Filing under FLPMA of a notice of intent to hold a mining claim creates no such presumption of performance of labor. Therefore, the filing of notice of intent to hold a mining claim is presumptive, but not conclusive, that there has not been substantial compliance with the obligation to annually perform labor, or make improvements, valued at not less than $100 per claim.

Affidavits of assessment work filed with the Bureau of Land Management in 1979, and thereafter, show that for all but 108 oil shale claims such labor has been resumed. The recent contesting of those 108 mining claims for which no affidavits of assessment work were filed for the last 2 or more years demonstrates that we will insist upon the statutory minimum amount of annual assessment work performance, and will police compliance via the FLPMA annual filing requirements. We will in the future continue to inquire into alleged nonsubstantial compliance with assessment work obligations through the initiation of contest proceedings, when and if notices of intent to hold, rather than affidavits of assessment work, are filed for two consecutive years. We must wait for at least a 2 year lapse of assessment work because of the precedent set by Wilbur and Ickes v. Virginia-Colorado Development Corp. that a 1-year lapse is insufficient to cause forfeiture to the Government. A resumption of annual labor prior to the initiation of contest will act to nullify such challenge.

Patent

A mineral patent application begins the process whereby a claimant obtains absolute title to the lands within a claim upon proof of satisfying the preceding elements of the mining law and upon payment of the statutory fees, in this case $2.50 per acre, for oil shale placer mining claims.

In addition to providing proof of meeting the standards required for the elements of mining laws, a claimant must also provide proof of a clear title to the mining claim. Any claimant who fails to meet the standards required by the elements of the law or who cannot provide clear chain-of-title will have the validity of such mining claims challenged in a contest action.

I have summarized a history complicated by lack of consensus on how to apply the mining laws to oil shale. Now, once again, the Department is attempting to formulate standards that will protect private property rights while serving the public interest. In doing so we hope to build the consensus necessary to satisfy all the interests involved in this controversy. Oil shale development depends on the state of technology, cost of production, the price of the product and continued access to the resource.

Currently, there are 1,541 oil shale mining claims remaining on public lands. Broken down by State, these are:

561 Colorado, approximately 82,770 acres;

345 Wyoming, approximately 54,400 acres; and

635 Utah, approximately 99,772 acres.

68 of these claims are embraced in a total of 6 mineral patent applications.

We will permit the remaining oil shale mining claims to be held by the claimants as before. All claimants or their operators conducting surface disturbing activities will be required to prevent unnecessary or undue degradation and to perform reasonable reclamation as required by the surface management regulations.

The Department has exhibited its willingness to reach a consensus in resolving the controversy surrounding the management of oil shale mining claims through briefings, meetings, solicitations for suggestions, and creation of a task force.

We look forward to working with the Congress to arrive at an acceptable solution to this long-term problem.

This concludes my statement. I will be pleased to respond to any questions.

Senator MELCHER. Senator Wallop.

Senator WALLOP. Mr. Chairman, I think that it is important because the Department has been accused of being sloth or inactive with regards to not appealing the *TOSCO* v. *Hodel* case. I think it would be useful if you, Mr. Cason would give the line of reasoning to the press and other people gathered here that is contained in your statement for not appealing.

Mr. CASON. Okay. Mr. Chairman, when we were faced with a decision on what to do about Judge Finesilver's opinion or his decision, we had two principal courses of action that we could pursue.

The first was to appeal the case on its merits to the circuit court, and the second was to settle. Judge Finesilver had advised us in his opinion or his decision that the Department really should get on with the business of settling these problems because we had been to court too many times and we were effectively denying private party rights by not settling. He did not demand that we settle, but he suggested strongly that we give it its due consideration.

We within the Department of the Interior had numerous discussions while reviewing whether we had more to gain by settling or whether we had more to gain by appealing. In regard to that discussion I have heard that we had solicitor's opinions from our Colorado regional solicitor's office.

Also involved in this process were opinions from our people in the Bureau of Land Management, employees in the State of Colorado. Opinions were garnered from the solicitor's office here in Washington. We consulted with the Secretary; we consulted with the Department of Justice; we talked to the claimants to find out what their positions were.

Hence, we went through a long, exhaustive process of weighing the advantages and disadvantages of the settlement process. It was not until we got very near the end of our opportunity to appeal that we finally made a decision. And it was after an exhaustive review of all the advantages and disadvantages of taking either of the courses of action.

What we felt—and what we were advised by our solicitor's office—was that we would have had to appeal several items to the court, and that we would have to win on all of the items in court before we could prevail. The prevailing opinion within our legal community was that we could not win all of the items. As such, we were faced with a prospect on appeal of reinforcing the case of the plaintiffs. To reinforce the case of the plaintiffs meant that we in the Federal Government would have to dispose of the entire Federal estate.

That meant all of the surface, all of the surface rights, all of the subsurface rights including oil, gas, coal, and other minerals. We within the Department of the Interior did not want to live with the precedent that came with the Judge Finesilver decision. In his decision he decided that $500 worth of work over the life of the claim was sufficient and represented substantial compliance.

We did not want to live with that precedent. So as part of the decisionmaking process, we decided that if we could negotiate an amicable settlement with the claimants, that reserved to the United States certain valuable rights which included oil, gas, and coal, for which we have leases on those properties, the Federal Government would be farther ahead than if we were to try and pursue another apparently fruitless appeal.

Another decision that came into the process is that the Federal Government has basically inexhaustible supplies of litigation money. We just tax the taxpayer and put the money into the general fund and then we go and litigate forever. And that is what we have been doing here for 70 years. And at some time, someone has to say, you have litigated enough.

The attorneys in our solicitor's office and in the Department of Justice reviewed the merits of the case and decided we had litigated enough and that what we could get out of the settlement was superior.

Senator **WALLOP**. Thank you. At least from this Senator's point of view, the judgment on the part of the Department not to risk losing the entire estate was a prudent choice. When you have the opportunity to settle rather than to lose it on its face, in its entirety.

Mr. **CASON**. Thank you, Senator.

Senator **MELCHER**. Mr. Cason, we will have some written questions from Senator Wirth to ask you, and thank you very much for your testimony.

Mr. **CASON**. Thank you.

Senator **MELCHER**. Mr. Cattany, Acting Deputy Director of Colorado Department of Natural Resources.

STATEMENT OF RONALD W. CATTANY, ACTING DEPUTY DIRECTOR, COLORADO DEPARTMENT OF NATURAL RESOURCES

Mr. **CATTANY**. I am the Acting Deputy Director at this point, thank you.

Mr. Chairman, I appreciate the invitation by Senator Wirth and his staff and your invitation to participate in this hearing. What I would like to do is summarize a detailed testimony that I have provided, and request that the full statement and supporting documents——

Senator **MELCHER**. Mr. Cattany, I am going to have to interrupt you. There is a vote on the floor, and I am going to have to leave. The Subcommittee will be in recess for probably ten minutes. Sorry about that.

[Recess]

Senator **WIRTH** [presiding]. Mr. Cattany, thank you for being here. Why don't we resume with our next witness, Mr. Ronald Cattany, the Assistant Director of the Department of Natural Resources for the State of Colorado.

We appreciate you being here, I am sorry that our previous witness got away. I just wanted to question him a little bit, about the ambiguities that exist in the law. If there are ambiguities in the interpretation of the law, it seems to me that raises the possibility of the exercise of a little administrative judgement. And anybody with any sense at all will look at $2.50 and say well we ought to at least ask a few questions about that.

I mean, something else has to have been going on tc allow that sort of thing to occur. Even when your own lawyers are telling you from the Denver office not to let it go ahead without appealing it. If nothing else, it is terrible, terrible judgement.

Mr. CATTANY. My concern is much more basic, which was I thought that this may have been the first opportunity we would have had to discuss this issue at the Department of the Interior. But I will get into that.

Senator WIRTH. What do you mean by that?

Mr. CATTANY. We have not had any direct discussion with the Department of the Interior since day one on this issue.

Senator WIRTH. Have you asked to have them?

Mr. CATTANY. We have asked both in court and through the Colorado office, and there has not been any consultation with the State of Colorado.

Senator WIRTH. How have they responded to your request?

Mr. CATTANY. Principly by——

Senator WIRTH. No answer?

Mr. CATTANY. No answer.

Senator WIRTH. Have you asked anyone in the delegation to run interference for you?

Mr. CATTANY. Not at this point, I do not think.

Senator WIRTH. Have you historically, do you know? Do you know?

Mr. CATTANY. No.

Senator WIRTH. Why don't you let us know. It seems to me that they also might be interested in listening to members of the delegation, getting you together. It appalls me even further that they would not talk to you all.

Mr. CATTANY. What is interesting about it is that our hope was that by taking a low key approach to dealing with this issue, it would allow us to expedite some surface management agreements with the individual claimants and to address our concerns that were not addressed in the federal settlement. And that has not occurred. And that is one of the reasons why we are here today, because we really do want to elevate the discussions.

Senator WIRTH. That is one of the problems we want to address today, but we shouldn't have to hold a hearing to do it.

Mr. CATTANY. That is correct.

Senator WIRTH. Well I am sorry that you are learning that lesson late. So in terms of the management of the land, and the wildlife issues and so on in the State of Colorado, that falls within the baliwick of Jim Ruche at Division of Wildlife?

Mr. CATTANY. It certainly does, the Division of Wildlife.

Senator WIRTH. Have they had discussions with Interior?

Mr. CATTANY. Not at this point.

Senator WIRTH. Fish and Wildlife has not had any discussions?

Mr. CATTANY. No, not at all.

Senator WIRTH. Even though that was part of the agreement, that there were to be discussions on how to best manage this for the purposes of all of the sportsmen and so on?

Mr. CATTANY. That is right. To my understanding, those issues have not been addressed with BLM since last comments were made on the Piceance Basin Resource Management Plan.

Senator WIRTH. Do you have a record of telephone calls and letters and requests to Interior to sit down and discuss these with you?

Mr. CATTANY. Not a formal record, mainly because it has all been informal. So I really would not want to call anything like that a formal record.

Senator WIRTH. Do you have any record of letters, have you sent letters to the Department of the Interior asking them to sit down?

Mr. CATTANY. Not at this point. We have sent them copies of all of the materials on the issues that we have raised since August of last year.

Senator WIRTH. And you said you would like to sit down with them?

Mr. CATTANY. That is right.

Senator WIRTH. So you have letters, you have written to them, there is a record of letters from you to them saying you would like to sit down with them?

Mr. CATTANY. But it is not really letters, it is just copies of our materials without formal cover letters. So it would just be copies of our interpretation of the agreements last August and any other additional documents we put together as part of our legal proceedings over the last 15 months.

Senator WIRTH. How does Interior, how do you all expect this to get resolved if you do not sit down with them? Maybe you have not made yourself clear to them that you want to sit down with them.

Mr. CATTANY. Well I think through our legal proceedings with the claimants, through our interventions in federal district court and the court of appeals, where representatives of Interior have appeared also to testify before those judiciary bodies, they are certainly aware of our concerns that we have raised, and have not, it is my understanding that the Colorado offices for example of BLM have just not been directed to hold those discussions with the state.

What has happened is that the Colorado office has informally advised us periodically of when patents were going to be issued, but were not able to do any more than that.

Senator WIRTH. Is there anybody here from the Interior Department? That hand barely going up in the back there, who do you work for at Interior?

VOICE. I am the congressional liaison.

Senator WIRTH. What is your name?

VOICE. Miller, Judy Miller.

Senator WIRTH. Have you been listening to this?

Ms. MILLER. Yes.

Senator WIRTH. Would it be possible for you to see what you could do to talk to the Interior Department and BLM to have them get together with the Department of Natural Resources?

Ms. MILLER. I will certainly report it back.

Senator WIRTH. Do you think that it is possible to get a response back from them?

Ms. MILLER. I think so.

Senator WIRTH. Who is responsible at Interior here in Washington?

Ms. MILLER. Secretary Hodel.

Senator WIRTH. Who under Secretary Hodel is responsible?

Ms. MILLER. I work for the Bureau of Land Management. I am here just simply to report.

Senator WIRTH. Why don't you send that information back, and what we will do is get right back to the Secretary. We are having difficulties with him on a series of other issues as well, such as, how much land is under lease in Alaska and what the adequacy of the EIS is and why the Interior Department changed its mind. There are a whole series of things. We will see if we can get him together with you all.

Mr. CATTANY. We have had an informal very brief conversation with Director Burford of BLM about the issue as well. I guess I could best characterize that as him expressing the concern that it was just preventing him from doing what he felt he had to do, which was to patent those lands.

Senator WIRTH. It seems to me that this gets even worse the deeper you get into it. Go ahead, I am sorry. We will include your testimony in full in the record and we appreciate your being here.

Mr. CATTANY. Colorado welcomes the opportunity to comment on both the process and the substance of the settlement of oil shale claims in Northwest Colorado. The settlement of these claims is important, not only to the companies and individuals wishing to invest in Northwest Colorado, but also to the local governments who derive revenues from these projects.

Our involvement in this effort over the past 15 months has been to assure that Colorado's interests are protected in both the management and disposition of its natural resources.

In general, Colorado's concern centers on three major issues. Number one is a full disclosure by the Department of the Interior on the process to be used to settle the patent issues.

The second is recognition of the interests of the State and other affected parties in decisions of this magnitude.

The third is receipt of fair market value for lands removed from the public trust.

In 1986 the State of Colorado filed a motion to intervene in the U.S. District Court and the U.S. Court of Appeals in the settlement of oil shale claims in Northwest Colorado. Colorado also filed a motion for a preliminary injunction so that our position could be heard before any settlements were implemented. We found it especially troublesome that neither the State of Colorado, local governments in Northwest Colorado, nor the private parties affected by the settlement were consulted prior to the agreement that was reached between the Department of the Interior and the claimants on August 4th, 1986.

The State's first glimpse of the agreement came after it was signed, from the press. It is the belief of the State of Colorado that the federal government represented the interest of the State during the litigation process over the past 25 years by arguing that keeping the resources under federal control was in the public interest.

When the federal government entered into private negotiations with the claimants without public participation, it violated that trust responsibility.

Further, it is our belief that a sale of land of this magnitude is subject to the provisions of the Federal Land Policy Management

Act of 1976. This law requires public participation, a 60 day gubernatorial review period for any agreement that is finalized, and Congressional authorization of land transfers of over 2,500 acres.

It is also our belief that the land transfer of this magnitude may also be subject to the provisions of the National Environmental Policy Act, which requires either an environmental impact statement, or a refinement of the existing statements and management plans currently in place to apply specifically to these 82,000 acres.

It is not the intention of the State of Colorado to prevent the patenting of valid oil shale claims. Those claimants who have satisfied the patent process outlined in the 1972 Mining Law are legally entitled to such patents. However, questions continue to be raised about the validity of some claims. For this reason, Colorado supported the initial freeze on the patenting of oil shale claims proposed in 1986 by Senators Melcher and Hart until the question of validity was resolved.

The State of Colorado concedes that the Interior agreement is a quantum leap beyond the conservative interpretation of the law exemplified in Judge Finesilver's 1985 decision which granted all surface and mineral rights to the claimants.

However, the transfer of surface rights to the oil shale claimants for unrestricted use at the end of a 20-year period, is inconsistent with the intention of obtaining mining claims for the purpose of mineral development. This precedent encouraged acquisition of public lands for speculative purposes.

At this time, the State has no preference between leasing the land for future oil shale development or patenting valid oil shale claims. The current value of the property would not result in substantial changes in the economics benefits to local governments. Based on current tax levels, the counties estimate that the tax revenues would differ from the current payments in lieu of taxes by only $500. The remainder of the revenue issues have not been addressed to date.

Privatization of the land would preclude annual rental payments and any bonus payments from the leasing of the land. At .50 an acre, the State would lose $20,000 annually on its share of rental payments if the 82,000 acres were patented instead of leased.

The failure to involve the State in the initial agreement has necessitated an inconvenient and cumbersome arrangement that involves a second tier of agreements. As a result of our intervention into the settlement process, the State of Colorado has begun negotiations to enter into surface management agreements with the claimants to provide restrictive covenants that would go with the land and be recorded as documents affecting title.

Such an agreement would be in effect until the time that resource development occurs, and would guarantee continued access by the state for the purposes of natural resource management.

Surface management agreements are critical because of the unique ecological, biological and wildlife features of these lands. The oil shale claims settlement could affect habitats for several plant species which are candidates for listing as threatened or endangered by the U.S. Fish and Wildlife Service.

In addition, the parcels contain several rare plant species which are on the Colorado Natural Areas inventory list of plant species of special concern to Colorado. Privatization of this land makes it more difficult to maintain the level of protection that exists under public ownership.

The area has significant wildlife potential as well. The Colorado Division of Wildlife calculates that as many as 24,000 recreation days could be lost at a cost of $2.5 million, and that approximately 50 percent of the harvest might not be achieved if access is restricted or denied.

Additionally, the Division of Wildlife has classified summer range in this area as critical habitat for elk. Several of the patent lands contain wildlife habitat, wildlife migration routes, riparian areas and elk calving and nursing areas as well as sage grouse habitat and blue grouse winter habitat. The maps that are provided in our supplemental materials identify those migration areas.

North Cathedral Bluffs contains a full spectrum to mid to high elevation vegetation, aquatic and geologic features, and spectacular scenic values representative of the Northwest part of the Piceance Basin, and should be designated as a Colorado Natural Area. Future federal management and disposition of oil shale land should be guided by three principles.

The first is that management by either lease or patent should be done in a manner that encourages the development of the resource.

The second is that management of the resource should be done in a manner that guarantees access in time of national need, and the third is that the disposition of the property should be done in a manner that provides a reasonable return to the federal government.

The market values of land affecting the decision area range from $700 to $1,500 an acre. In 1985 our Division of Wildlife sold several acres in that area, and the land sold for $400 an acre for non-irrigated land, and $1,500 an acre for irrigated land. Under current patenting procedures the federal government is not realizing fair market value for these lands. Placing the value on 1872 prices undervalues the resource and places patenting at a competitive revenue disadvantage to leasing. However, in soft energy markets such as today, depending solely on a leasing system, may preclude any activity and related revenues due to lack of demand for the resource.

In summary, Colorado's concerns on this issue have not been with the companies but rather with the federal government. It is not our intent to prevent the patenting of valid oil shale claims. Nor is it our intent to dictate whether oil shale land should be leased or patented.

It is our intent however, to assure Colorado's place at the decision table. Oil shale has both a long term strategic value to the country and short term economic uses such as high grade asphalt. Colorado supports the oil shale industry in Colorado, and is appreciative of the efforts of Representative Campbell and Senators Wirth and Garn to carry legislation this session, to establish an economic enhancement program for western oil shale.

It is our intention to work with the industry, Congress and the Department of the Interior to reach a compromise that allows oil shale to be developed in a timely and competitive manner, while allowing the State of Colorado to continue its resource management responsibilities.

Thank you for the opportunity to appear before you today, and I would be please to answer any questions that you might have.

[The prepared statement of Mr. Cattany follows:]

TESTIMONY FOR THE
SENATE SUBCOMMITTEE ON MINERAL RESOURCE
DEVELOPMENT AND PRODUCTION
BY
RONALD W. CATTANY
ACTING DEPUTY DIRECTOR
COLORADO DEPARTMENT OF NATURAL RESOURCES

OCTOBER 16, 1987

Introduction

Colorado welcomes the opportunity to comment on both the process and the substance of the settlement of oil shale claims in Northwest Colorado. The settlement of these claims is important not only to the companies and individuals wishing to invest in Northwest Colorado, but also to the local governments who derive revenues from these projects. Our involvement in this effort over the past 15 months has been to assure that Colorado's interests are protected in both the management and disposition of its natural resources.

Our testimony is divided into three major components:

- A discussion of our reasons for intervention;
- Colorado's approach to surface management agreements to fill the voids in the August 1986 oil shale settlement; and
- The critical resource management issues at stake in the settlement.

I will also outline some issues to be considered for future leases or patents on oil shale lands.

Insert A

Reasons for Intervention

In 1986, the State of Colorado filed a motion to intervene in the United States District Court and the U.S. Court of Appeals in the settlement of oil shale claims in Northwest Colorado. Colorado also filed a motion for a preliminary injunction so that our position could be heard before any settlements were implemented.

The purpose of this intervention was twofold:

1. To recognize the processes that have been established in federal law in a land transfer of this magnitude; and
2. To recognize the interests of the State of Colorado and the due process to which other members of the public who may be affected by this decision are entitled.

STATE OF COLORADO
DEPARTMENT OF NATURAL RESOURCES
Executive Director's Office
1313 Sherman Street, Room 718
Denver, Colorado 80203
866-3311

From the Desk of

RONALD W. CATTANY
ASSISTANT DIRECTOR

INSERT A

In general, Colorado's concerns center on three major issues:

1) Full disclosure by the Department of Interior on the process to be used to settle the patent issue;
2) Recognition of the interests of the state and other affected parties in decisions of this magnitude; and
3) Receipt of fair market value for lands remove from the public trust.

We found it especially troublesome that neither the State of Colorado, local governments in Northwest Colorado nor the private parties affected by the settlement were consulted prior to the agreement that was reached between the Department of the Interior and the claimants on August 4, 1986. No formal invitation was received by the State of Colorado on behalf of the claimants or the U.S. Department of the Interior to participate in the negotiations of the settlement agreement. The state's first glimpse of the agreement came after it was signed, from the press.

The settlement affects 82,000 acres of prime oil shale land in Northwest Colorado. In total, there are over 23,000 claims on 360,000 acres of federal land in Colorado, Utah and Wyoming which could be affected by this settlement. The claims on these lands were made prior to 1920. Over the past 65 years, the federal government and the courts have passed various conflicting judgments on the claims. The validity of the claims has been questioned at several points during this extended process.

It is the belief of the State of Colorado that the federal government represented the interest of the state during the litigation process over the past 25 years by arguing that keeping the resources under federal control was in the public interest. When the federal government entered into private negotiations with the claimants without public participation, it violated that trust and responsibility.

Further, it is our belief that a sale of land of this magnitude is subject to the provisions of the Federal Land Policy Management Act of 1976. This law requires public participation, a 60-day gubernatorial review period before any agreement is finalized, and congressional authorization of land transfers of over 2,500 acres. In this particular case, various public groups are affected by the decision: local governments, hunters, ranchers, farmers, recreationists and other potential developers. It is our belief that a land transfer of this magnitude may also be subject to the provisions of the National Environmental Policy Act, which requires either an environmental impact statement or a refinement of the existing statements and management plans currently in place to apply specifically to these 82,000 acres.

It is not the intention of the State of Colorado to prevent the patenting of valid oil shale claims. Those claimants who have satisfied the patent process outlined in the 1872 Mining Law are legally entitled to such patents. However, questions continue to be raised about the validity of some claims. For this reason, Colorado supported the six-month freeze on the patenting of oil shale claims proposed in 1986 by Senators Melcher and Hart until the question of validity was resolved.

The State of Colorado concedes that the Interior agreement is a quantum leap beyond the conservative interpretation of the law exemplified in Judge Finesilver's 1985 decision, which granted all surface and mineral rights to the claimants. In separating oil shale from other minerals and from other land uses, the agreement did leave other mineral and surface development in the public trust. However, the transfer of surface rights to the oil shale claimants for unrestricted use at the end of a 20-year period is inconsistent with the intention of obtaining mining claims for the purpose of mineral development. This precedent encourages acquisition of public lands for speculative purposes.

The State of Colorado has several concerns with the approach used by the Department of the Interior to settle these claims. The agreement itself is problematic regarding future access for resource management on these lands. The process and agreement establish serious precedents for future public land management issues. In particular, the areas of concern to the State of Colorado include the following:

- Removal of the land from the public trust;
- Maximum return on the assets of the public trust;
- Representation of state interests;
- Unrestricted latitude in future land uses;
- Impacts on farming, ranching and hunting;
- Federal land use pre-emption;
- Lack of economic impact analysis; and
- Lack of oversight provisions in the implementation of the settlement.

The lands affected by this settlement contain some of the nation's richest oil shale deposits. Both the TOSCO and Ertl claims, each of which are many times the size of Federal Tracts C-a or C-b, contain high-grade shale in excess of 25 gallons per ton. The Ertl property has shale deposits very near the surface. Minimal overburden could make the shale minable through surface mining methods which would greatly enhance the economics of future oil shale production. The TOSCO property controls the access to the Naval Oil Shale Reserve.

At this time, the state has no preference between leasing the land for future oil shale development or patenting valid oil shale claims. The current value of the property would not result in substantial changes in the economic benefits to local governments. When the land is held by the federal government, a payment in lieu of taxes from the federal government to the county is made to compensate for the loss in property tax revenues. Currently, the affected counties receive about $16,000 in payments in lieu of taxes from the federal government on these properties. The county assessors currently appraise the land at $5 to $10 an acre for tax purposes. The oil shale is also valued in that range. Based on current tax levels, the counties estimate that the tax revenues would differ from current payments in lieu of taxes by only $500.

The remainder of the revenue issues have not been addressed to date. The magnitude of ad valorem taxes when the property is improved and production occurs is unknown. Privatization of the land would preclude annual rental payments and any bonus payments from the leasing of the land. The state and local jurisdictions receive 50 percent of any of these lease-related revenues. At $0.50 per acre, the state would lose $20,000 annually on its share of rental payments if the 82,000 acres were patented instead of leased. In 1974, when Federal Tracts C-a and C-b were leased, the bonus payments were valued at over $160 million for a total of 10,240 acres. Should oil shale land become valuable as a resource in the national interest, sizable bonus payments and annual rents under a leasing program could exceed the projected property tax revenues.

Colorado's Surface Management Agreements

The failure to involve the state in the initial agreement has necessitated an inconvenient and cumbersome arrangement that involves a second tier of agreements. As a result of our intervention into the settlement process, the State of Colorado has begun negotiations to enter into surface management agreements with the claimants to provide - restrictive covenants that would go with the land and be recorded as documents affecting title. Such an agreement would be in effect until the time that resource development occurs and would guarantee continued access by the state for the purposes of natural resource management. At that time, surface management decisions would be subject to the Colorado Mined Land Reclamation Act, local land use regulations and special use permits. The State of Colorado is currently in active negotiations with the Ertl Trust and their new partner, Shell Oil. The state has had preliminary discussions with Unocal. In addition, the negotiations for surface use agreement are anticipated with TOSCO, Exxon and the attorney for a number of individual claim holders. The Ertl Trust has been very active in bringing these other companies to the table.

Our proposed surface management agreement contains the following provisions 1) compliance with existing land use laws; 2) an annual report outlining proposed land use changes; 3) consolidation of utility and transportation corridors; 4) minimization of traffic impacts on wildlife; 5) restrictions on the use of firearms; 6) state consent for spraying and burning; 7) establishment of grazing standards; 8) consultation on forest management; 9) protection, mitigation or replacement of riparian areas affected by development; 10) free access for hunting; 11) restrictions on road closures; and 12) protection of areas of scenic beauty or natural significance.

This extra step to protect Colorado's interests has caused inconvenience to all parties.

This spring, the Paraho Corporation, which is owned by the Ertl Trust, identified potential financial sponsors for a project to test the feasibility of producing asphalt from oil shale. Their potential sponsors were concerned about the cloud over clear title to the land caused by our intervention. At one point, discussions broke down over this issue.

In addition, several sales of patent lands have been executed. The Ertl Trust has executed a 1963 agreement to transfer 15,000 acres of land to 10SCO Corporation for $250 an acre. The Ertl Trust has also sold acreage to Shell Oil Company. As a result, while a preliminary agreement was reached with the Ertl Trust last spring regarding the surface management, the agreement is now being renegotiated based on several concerns voiced by their new partner. These types of complications have increased the cost and effort related to settling this issue.

Such costs could have been avoided had the federal government brought the state to the negotiating table before the initial agreement was drafted. Last spring, the Justice Department advanced a proposal to the Deputy State Attorney General that would provide prior notification of patenting of future claims, including a 60-day gubernatorial review period for future patents. The condition for this accommodation was that the state drop its legal actions and agree not to testify on any proposed oil shale legislation. This was to be an agreement between the Reagan Administration and the State of Colorado. Upon follow-up with the Justice Department on this proposal, the Deputy State Attorney General was told that Interior was less than enthusiastic about entering into such an agreement and that the Justice Department was not anxious to bring the concept up again.

Critical Resource Management Issues

Surface management agreements are critical because of the unique ecological, biological and wildlife features of these lands. The oil shale claims settlement could affect habitats for several plant species which are candidates for listing as threatened or endangered by the U.S. Fish and Wildlife Service. In addition, the parcels contain several rare plant species which are on the Colorado Natural Areas Inventory list of plants species of special concern to Colorado. Privatization of this land makes it more difficult to maintain the level of protection that exists under public ownership.

The area has significant wildlife potential as well. The major impact of the privatization of federal lands in the Piceance Basin is the loss of the ability of the Colorado Division of Wildlife to properly manage deer and elk herds. Hunting is the most effective tool that the Division has to manage big game populations. If access is restricted in the Basin, management may become increasingly difficult. The Colorado Division of Wildlife calculates that as many as 24,000 recreation days could be lost at a cost of $2.5 million and that approximately 50 percent of the harvest might not be achieved if access is restricted or denied.

Additionally, the Division of Wildlife has classified summer range in this area as critical habitat for elk. There is a narrow band of aspen and spruce pockets bordering the Basin on the south and the west that are especially important as cover for breeding and shelter. Several of the patent lands contain wildlife habitat, wildlife migration routes, riparian areas, and elk calving and nursing areas. The ridgetops are considered critical sagegrouse habitat. All springs and aboveground waters are critical for all wildlife species, including nongame mammals and birds. The spruce trees are critical to the blue grouse for winter habitat. Bear and mountain lion also frequent the area.

North Cathedral Bluffs contains a full spectrum of mid- to high-elevation vegetation, aquatic and geologic features and spectacular scenic values representative of the northwest part of the Piceance Basin. It was identified in 1984 in the BLM Piceance Basin Resource Management Plan for special management consideration due to the existence of rare plants, important plant communities and scenic values. North Cathedral Bluffs should be designated a Colorado Natural Area.

Future Management Concerns

Future federal management and disposition of oil shale lands should be guided by three principles:

1. Management by either lease or patent in a manner that encourages the development of the resource;
2. Management of the resource in a manner that guarantees access in time of national need; and
3. Disposition of the property in a manner that provides a reasonable return to the federal government.

The market values of the land affected by the decision range from $700 to $1,500 per acre. Under the current patenting procedures, is the federal government is not realizing fair market value for these lands. This discrepancy between fair market value and value received is especially tough to reconcile when questions over the validity of these claims arise.

When the state looks at the opportunities to either dispose of lands, to exchange them or trade them for lands of either higher value or in a more beneficial location, it does so based on the fair market value of the lands that are affected.

The federal government should establish a similar valuation procedure so that when lands are patented they are done so in a way that reflects the true market value of those lands rather than values set in 1872. If this type of procedure is followed, then lands can be made available both through leases and the patenting of mineral claims. The current system undervalues the resources and places patenting at competitive revenue disadvantages to leasing.

Conclusion

In summary, Colorado's concerns on this issue have not been with the companies but rather with the federal government. It is not our intent to prevent the patenting of valid oil shale claims, nor is it our intent to dictate whether oil shale lands should be leased or patented. It is our intent, to assure Colorado's place at the decision table.

Oil shale has both a long-term strategic value to the country and short-term economic uses such as high-grade asphalt. Colorado supports the oil shale industry in Colorado and is appreciative of the efforts of Representative Ben Nighthorse Campbell and Senators Tim Wirth and Jake Garn to carry legislation this session to establish an economic enhancement program for western oil shale. It is our intention to work with the industry, Congress and the Department of Interior to reach a compromise that allows oil shale to be developed in a timely and competitive manner, while allowing the State of Colorado to continue its resource management responsibilities.

Thank you for the opportunity to appear before you today. I would be pleased to answer any questions.

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STATE OF COLORADO ROY ROMER, Governor
DEPARTMENT OF NATURAL RESOURCES
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Geological Survey
Board of Land Commissioners
Mined Land Reclamation
Division of Mines
Oil and Gas Conservation Commission
Division of Parks & Outdoor Recreation
Soil Conservation Board
Water Conservation Board
Division of Water Resources
Division of Wildlife

OIL SHALE CLAIMS IN NORTHWEST COLORADO

Bureau of Land Management Settlement
State of Colorado Analysis
October 1987

Overview

On August 4, 1986, the Bureau of Land Management and the Department of Interior reached agreement on the settlement of 525 unpatented oil shale placer mining claims affecting 82,000 acres in the Green River formation of Colorado. These claims are held by numerous oil companies, firms and individuals. In total, there are over 2300 claims on 360,000 acres of federal land in Colorado, Utah and Wyoming which could be affected by this settlement. In this settlement, 43,640 acres are in Rio Blanco County and 36,360 acres are in Garfield County. Map 1 identifies the claim areas.

The agreement settles claims that were made prior to 1920 under the 1872 Mining Law. That law outlines certain due diligence requirements and could lead to a patent of the mineral right for a $2.50 fee. At this rate, the 82,000 acres of land in the decision would yield $205,000 to the federal government. The land has been appraised by the counties at $5 - $10 an acre. The oil shale rights have also been assessed in that range. The market values of the lands in the area range from $700 to $1500 per acre.

After the passage of the Mineral Leasing Act of 1920, similar lands were made available for leasing only. A leasing action generates revenues from bonus payments on the lease bid, annual rent payments and royalty payments on mineral production. These revenues are shared 50-50 with state and local governments. The allocation of those monies within the state is set by the legislature.

From 1920 until today, a variety of decisions by the Department of Interior and the courts have affected these claims. In the 1930's, the Government Land Office, the predecessor of BLM, withdrew much of the shale lands and declared many of the oil shale claims void for a variety of reasons, including the failure to perform required diligence work or failure to register the claims properly. In the 1940's and 1950's, speculators bought many of the claims, often by means of quit claim deeds, regardless of the validity of the claims. In the early 1960's, BLM once again contested the claims resulting in several lawsuits. In 1980, the Supreme Court held that oil shale is a valuable mineral that is patentable. In 1982 briefs were filed identifying 202 of the 525 claims void since they did not meet the claim and patent criteria.

In 1985, in a case involving TOSCO, Judge Finesilver, of the 10th District Court, upheld the validity of the claims based on the inconsistency of previous federal government actions in handling the issue over the past 65 years. In that decision, all rights and privileges of the public land were transferred to the claimants including: hunting, grazing, rights-of-way, sand, gravel, oil shale, oil, gas, coal royalty revenues and surface rights.

The United States decided to work out a compromise with the claimants rather than litigate the issues any further. The compromise transfers oil shale, and sand and gravel rights to the claimants. It retains for the federal government grazing and hunting use, rights-of-way, oil/gas/coal ownership and royalty revenues -- with certain caveats and provisions. The settlement restricts claimants' non-oil shale activities on the surface for 20 years, but it does provide them with the surface access necessary to produce the shale oil. At the end of that period, the surface rights will be turned over to the claimants for any use -- residential, commercial or industrial.

The U.S. mineral interests and surface interests are subservient to the right for oil shale development. The U.S. interests will be dominant for the non-oil shale surface uses for 20 years. The United States will file pleadings in water court relinquishing or withdrawing their water rights claims on the affected lands.

About 80 percent of the nation's recoverable reserves of oil shale are in the Piceance Basin. The lands affected by this settlement contain some of the nation's richest deposits. Both the TOSCO and Ertl claims, each of which are many times the size of Federal Tracts C-a or C-b, contain high-grade shale in excess of 25 gallons per ton. The Ertl property has shale deposits very near the surface. Minimal overburden could make the shale mineable through surface mining methods, which would greatly enhance the economics of future shale production. The TOSCO property controls the access to the Naval Oil Shale Reserve.

On September 19, 1986, the State of Colorado filed a motion to intervene in this settlement in United States District Court and the United States Court of Appeals. Colorado seeks to enjoin any conveyances contemplated by this agreement until Colorado's position can be heard. The purpose of this intervention is twofold: 1) to recognize the processes that have been established in federal law in land transfers of this magnitude; and 2) to recognize the interests of the State of Colorado and the due process to which other members of the public who may be affected by this decision are entitled. It is the interpretation of the Colorado State Attorney General that this action is subject to several provisions of the Federal Land Policy Management Act of 1976 and the National Environmental Policy Act.

On October 13, 1986, the 10th Circuit Court of Appeals denied the motion to intervene on the grounds of mootness, and the stay was dissolved.

On December 8, 1986, on behalf of various Colorado officials and public agencies, including Governor Richard Lamm, a complaint and motion for preliminary injunction were filed in Washington, D.C., challenging the validity the agreement between the United States and oil shale claimants. Basically, the suit alleges that the agreement is null and void due to non-compliance with the provisions of the Federal Land Policy Management Act (FLPMA) and the National Environmental Policy Act (NEPA). It is significant to note that the suit does not challenge the alleged merits of the Oil Shale Agreement which was intended to settle pending cases in the Colorado Federal District Court and the 10th Circuit. In other words, this suit is a procedural rather than a substantive challenge.

On January 7, 1987, the U.S. filed a motion to transfer the case back to Colorado.

Since February 1987, the State of Colorado has been working with the claimants to establish surface management agreements which will be covenants that will go with the land. The agreements cover hunting, fishing, grazing, spraying, transportation and utility corridors, wildlife habitat and natural areas. Representatives of Ertl/Shell and Unocal have been involved to date. Expressions of interest have been received informally from TOSCO, Union and representatives of the individual owners.

Colorado Concerns

Neither the State of Colorado nor local governments were a party to the agreement. The State is directly impacted by the agreement based on its activities in the area including wildlife management, in-lieu land selections and development of recreational opportunities. Local governments are affected by present and future revenue sources and land use decisions. Conveyance of the lands to private ownership removes them from the public domain, dramatically changing the terms under which surface uses are managed by the public sector. Specific concerns include:

- Removal of land from the public trust. The acreage involved in the proposed settlement is essentially a privatization of resources previously held in the public trust. It is removing public land which could be available for alternate uses (recreation, grazing or preservation) from the sphere of public management. By removing this land from public management, the potential multiple uses of the land (recreation, grazing or preservation) may never be realized.

- Maximum return on the assets of the public trust. Some experts say the land in the area is valued between $700 and $1500 an acre. At $2.50 per acre, the federal government did not maximize its return on this asset. Further, many uses of those lands under the proposed agreement would not generate any revenues for state or local governments. If the claims are upheld, the dollar value of those claims should take into account the long-term, life cycle cost of the benefits of those lands to the public. In reality, oil shale's major use will be as a strategic fuel in times of crisis.

At that time, the value of oil will be inflated. Therefore, the value of those claims today should consider the future values of the resource rather than today's soft market. A patent claim fee of $2.50 is not representative of any of these ranges of value. Management of public assets includes maximizing the value of those lands to the public sector based on the range of possible uses for those lands.

Representation of state interests. The settlement of the claims marks a change in course for the federal government, which for more than two decades has contested the mining claims in court. Through this litigation process, it has represented the interests of the State of Colorado by arguing that keeping the resources under federal control was in the public interest. When the federal government entered into private negotiations with the claimants without state or local government participation, it violated that trust. The secretive process raises several questions about the settlement:

- o Does the 1872 mining law grant the Department of Interior the authority to enter into such an agreement?
- o Are there federal procedures that must be followed in a land transfer of this magnitude?
- o Has due process been met on the part of the grazees and other users of the land in shifting ownership which may affect their rights for access and use?
- o Should gubernatorial approval be required for an action of this magnitude?
- o Does a land transfer exceeding 2,500 acres require Congressional approval?
- o Does an agreement of this nature require an environmental impact statement or a revision to existing statements or management plans that deal specifically with these 82,000 acres?

Latitude in future uses and intentions. The language is vague in terms of the rights of the claimants in using the surface rights. If the federal government does not claim the surface rights for its use over the next 20 years, the claimants appear to have complete discretion over surface use (recreation, grazing and hunting) and full right to the revenues. How is "reasonable public access" defined?

Impacts on farming, ranching and hunting. While the settlement provides for existing grazing and hunting uses, it gives considerable latitude to claimants. Lands could be posted after the patents are issued because of access and liability problems related to hunting. The settlement also places uncertainties on Western Slope ranching activities. Ranchers will be able to use this land for grazing under the financial terms, but not necessarily the other terms of the permits they currently have with the federal government. When those permits expire, they would be required to renegotiate agreements with the new owners.

- Federal land use pre-emption. In the resource management plans that have been completed for the area, local land use concerns are addressed. This same procedure should be incorporated in the transfer of public lands to private owners. Since land use decisions rest with local government in Colorado, they should be a participant at the negotiation table.

- Holding claims for land speculation. With regard to federal leases and other claims to federal lands, minimal requirements of due diligence on those claims should be met. There should be a good faith effort on the part of any company either to explore, assess and develop the resources or to relinquish them. The holding of public lands for speculative purposes is not in the public interest and is not fair to other companies who may wish to acquire the resource for development. The state has been firm in enforcing the due diligence requirements of federal coal leases. It has also limited the range of alternatives for due diligence (e.g., significant expenditures) as justification for holding a lease. Tying up federal lands unnecessarily may prevent viable alternative projects from moving forward due to the lack of accessible lands.

- Lack of economic impact analysis. If the privatization of the land is upheld, the counties would receive property taxes and ad valorem taxes on the structures and improvements to the property. No economic analysis exists comparing the potential revenues from this agreement to the revenue stream that would be generated from the leasing of the land for mineral development. The state estimates that at current assessed values the difference between payments in lieu of taxes and property taxes would amount to only $500. In addition, the state would receive approximately $20,000 annually in its share of rental payments if the land were leased instead of patented. Incomes from bonus payments and royalties under a lease are unknown.

- Oversight of provisions of the settlement. Colorado is entitled to participate in the design and implementation of the settlement. In addition, Colorado recommends that the final transfer of surface rights 20 years from now be reviewed at that time before a transfer is made.

- Future implications. The settlement may have broad implications for other mining claims on the remaining 240,000 acres in the West that have yet to be settled. This includes over 99,000 acres in Colorado.

Economic Benefits of the Agreement

Federal lands are made available for mineral development through two principal channels: patents and leases.

When a significant mineral discovery is identified, an individual may claim the right to that mineral under the procedures outlined under the 1872 Mining Law. The claimant is granted the right to that mineral as well as the surface access necessary to mine that claim. The claimant is required to document a minimum of $100 per year in exploration, assessment or development work. After five years and $500 of investment, a patent may be granted. The patent transfers the ownership of that mineral right to the claimant. At that point, the claimants are responsible for local property taxes on the mineral rights and on any surface rights required to produce the mineral. They are also responsible for state severance taxes.

In leasing the minerals, the federal government retains both surface and mineral rights. The minerals are made available through a bid and bonus payment process. The bidder with the highest bonus payment wins the lease. The leaseholder is then required to pay rent on the land regardless of production. Royalty payments are required when production begins. Rents, bonus and royalty payments are divided 50/50 between the federal government and state and local governments. The state portion is then allocated to local governments based on a formula prescribed by the legislature. For example, in 1974, federal tracts C-a and C-b were leased for oil shale development. The bonus payment value to obtain the lease was $210 million for tract C-a and $117 million for tract C-b. The claimants pay 50¢/acre annually in rent for each of the 5,120 acre tracts. Fifty percent of these dollars are returned to the state.

When land is held by the federal government, a payment in lieu of taxes from the federal government to the county is made to compensate for the loss in property tax revenues. In 1984, Rio Blanco received an average of 10¢/acre on the federal lands including these oil shale properties. Garfield County received an average payment of 34¢/acre. These payments are based on a baseline of 75¢/acre adjusted for previous payments and revenues from timber and mineral activity. Rio Blanco County now gets about $4300 in federal payments and Garfield County receives about $12,000 on these lands.

The Garfield and Rio Blanco county assessors are currently appraising the land at $5 - $10 per acre for tax purposes. The oil shale is also valued in that range. Based on current tax levels, the Bureau of Land Management estimates that tax revenues would be about $4800 in Rio Blanco County. Garfield County anticipates that property tax revenues would be comparable to the current payments in lieu of taxes.

In terms of payments in lieu of taxes versus property taxes, the difference is insignificant today. No economic analysis has been done on the magnitude of ad valorem taxes when the property is improved and production occurs. However, privatization of the land precludes annual rent payments at 50¢ per acre and any bonus payments from leasing the land. The annual rent payment at 50¢/acre would yield a total of $41,000 each year $20,500 of which would be returned to Colorado and the local jurisdictions. Privatization of the land also precludes any revenues from bonus payments from the bid process for leases. The state and local jurisdictions would receive 50 percent of those revenues as well. The state's share of the bonus payment from the 1974 leasing of tracts C-a and C-b was valued at over $160 million for a total of 10,240 acres. This approach applied to these lands could result in sizeable bonus payments and an annual rent payment in excess of projected property tax revenues today.

Reduced Recreational Opportunity

All 82,000 acres of the settlement occur within Planning Region 11. McKean and Nobe, 1981, reported $19,450,000 in direct annual expenditures by deer hunters within the region and $5,413,000 in direct annual expenditures by elk hunters within the region. There are four counties within State Planning Region 11 (Moffat, Rio Blanco, Garfield and Mesa). All impacts occur in two counties of this region -- Rio Blanco and Garfield counties. The deer and elk direct expenditure impacts are distributed to the county level based on recreation days for deer and elk hunters on the impacted areas in each county. In 1981, there were 147,166 deer recreation days and 169,066 elk recreation days within the region. Dividing the total deer economic impact by total deer recreation days yields the average economic impact per recreation day. The same methodology is applied to elk.

When this data is scaled down to the settlement portion of these two counties, the following financial impacts can be estimated:

County	Wildlife Species	Total Rec. Days	Projected Rec. Days Lost	Avg. Expenditure/ Rec. Day	Direct Expenditures Lost*
Rio Blanco	Deer	34,167	12,657	$132.16	$1,672,749
	Elk	59,525	4,158	32.02	133,139
					$1,805,888
Garfield	Deer	35,427	4,898	$132.16	$ 647,320
	Elk	46,059	2,035	32.02	65,161
					$ 712,481

In the worst case, the total loss in Direct Expenditures would be $2,518,369 annually as well as loss in the various city and county taxes derived from related sales.

Real Estate Appraisals

The Division of Wildlife contracted an appraisal on two tracts of land in the settlement area totalling 1,400 surface acres within the Piceance Basin in December 1985. Surface non-irrigated acreage was valued at $400 per acre, and surface irrigated acreage was valued at $1500 per acre.

Wildlife Habitat and Migration Impacts

The major impact of the privatization of federal lands in the Piceance Basin is the loss of the ability of the Colorado Division of Wildlife to properly manage the deer and elk herds. Hunting is the most effective tool that the Division has to manage big game populations. Under current conditions, it is hard to obtain an adequate harvest when population is at high levels. If access is further restricted in the Basin, management may become impossible. The Colorado Division of Wildlife calculates that as many as 24,000 recreation days could be lost and approximately 50 percent of the harvest not be achieved as a result of this action. Additionally, the Division of Wildlife has classified summer range in this area as critical habitat for elk. There is a narrow band of aspen and spruce pockets bordering the basin on the South and West that is especially important as cover due to the Xeric climate of the region. Most of the lands proposed for patent are included in this classification. Migratory and habitat patterns for elk are summarized in Map 2 and for deer in Map 3.

The Ertl property includes several features of significance to the wildlife of the area. The subject property is a principle migration area for deer, and a critical habitat area for elk for calving and nursing. Critical areas include: Duck Creek, KU Gulch and Spruce Gulch. The area between Roan Plateau and the winter areas in Monument Gulch and Spring Creek is a migratory corridor for deer. All drainages with aspen and spruce trees are necessary for elk and deer. All springs and aboveground water are critical for wildlife species, including non-game mammals and birds. The ridge tops between Ryan Gulch and Duck Creek are critical sage grouse habitat. Sagebrush on these ridges should be disturbed as little as possible. No burning or spraying should be done without consultation with the Division of Wildlife. The spruce trees are very important as escape cover for elk and deer during hunting season. They are also critical to the blue grouse as winter habitat. Bear and mountain lion also frequent the area.

There are several wildlife issues on the Union and TOSCO patent lands on the south side of the Piceance Basin.

On the divide between the Piceance and Parachute drainages, the major issue is continued hunter access. Historically this BLM land is a very popular place for hunting deer, elk, lion, bear and grouse. The major access roads that should remain open in that area are: 1) Sprague Gulch access road which leads to the top of that divide from Piceance Creek; and 2) Cow Creek access road which leads to the top of that divide from Piceance Creek. Both roads run north/south from Piceance Creek to the divide. The Sprauge access road is approximately nine miles down Piceance Creek or west of Piceance Creek from Highway 13. Cow Creek is approximately three miles west of Highway 13 down Piceance Creek. In addition, the road that runs east and west of the divide between Piceance and Parachute drainages should remain open to provide circular access through the area.

With regard to habitat, the major species of concern would be sage grouse, blue grouse, deer, elk, black bear, and mountain lion. Although the area is not critical for the maintenance of a population, there would be noticeable impacts as development occurs. The sage grouse inhabit the ridge tops. Any degradation on a large scale on the ridge tops will impact sage grouse. The blue grouse inhabit both the ridge tops and the side hills. The quaker or aspen trees and heads of the drainages would be considered critical for the maintenance of those blue grouse.

The division has been conducting a deer study for approximately six years in conjunction with operations at the C-b Oil Shale Tract. The deer migrate down that divide or off the side hills to either Piceance Creek or Parachute Creek, with the Piceance Basin being the preferred location. Most of the deer seem to winter in Piceance Creek. The Division has not been able to designate specific routes of travel. The aspen trees associated with water and heads of drainages both on the Piceance Creek side but more specifically on the Parachute side are critical to those deer. A study conducted four or five years ago indicated that fawning areas were very closely associated with the aspen habitat. For the fawns, the understory in aspen is very good for concealment. Water is needed more frequently during fawning time.

Impacts on Rare Plants and Plant Communities

The oil shale claims settlement will affect habitats for several plant species which are candidates for listing as threatened or endangered by the U.S. Fish and Wildlife Service. In addition, the parcels contain several rare plant species which are on the Colorado Natural Areas Inventory's list of "plant species of special concern to Colorado." The Colorado Natural Areas Program has completed extensive floristic inventories in the Piceance Basin between 1982-1986. The vegetation of the Piceance Basin is one of the best known in the state. These features have been identified in the Piceance Basin Resource Management Plan. Privatization of this land does not guarantee the level of protection that exists under federal ownership.

The principal impact from the settlement to the vegetation of Piceance Basin is the development of South Cathedral Bluffs. South Cathedral Bluffs was identified by the Colorado Natural Areas Program, the Nature Conservancy and the Colorado Native Plant Society as the highest priority for protection and special management in the Piceance Basin due to rare plants, geologic features and scenic beauty. The identified oil shale settlement area includes South Cathedral Bluffs, and impacts from mining could be substantial on the bluffs.

A portion of the Weber Oil property bisects South Cathedral Bluffs, which has been designated a Colorado Natural Area and BLM Area of Critical Environmental Concern. The bluffs contain a significant assemblage of plants and communities endemic to the Green River Shale.

The portion of the mineral claim included in the natural area boundaries of South Cathedral Bluffs should be protected to preserve the integrity of this important endemic plant habitat by including it in the existing BLM and Colorado Natural Areas designations.

The following summary of vegetation values is keyed to Map 1.

Parcel	Rare Plants/Plant Communities
Ertl/Shell	North Cathedral Bluffs Piceance bladderpod 2 rare plant: Barneby's columbine 3 rare plant communities: Douglas fir - serviceberry - elk sedge Wyoming big sagebrush - snowberry - Pacific giant wildrye Douglas fir - mountain snowberry - elk sedge
Weber	The following plants and plant communities could be threatened on the South Cathedral Bluffs property. 4 rare plants: Dragon milkvetch Piceance bladderpod Barneby's Columbine Utah fescue 2 rare plant communities: Beardless bluebunch wheatgrass Great Basin grassland in good condition Douglas fir - mountain snowberry - elk sedge

COAL BED METHANE RESOURCE POTENTIAL

The agreement area has significant mineral and energy resource reserves. The current agreement preserves the federal ownership of these resources. This is significant since the 4,000 square miles of the Piceance Basin contain coal and gas resources in Cretaceous Mesaverde coal seams. There are approximately 250 billion tons of deeply buried (3,000 ft +) high volatile A to semi-anthracite coals containing up to 77 trillion standard cubic feet of gas. In the portion of the Piceance Basin containing the oil shale, the underlying coals average 90 feet net thickness and average 350 cubic feet of methane gas per ton. Coal bed methane is currently being developed in the San Juan Basin of Colorado and will be a significant resource along with "tight gas sand" when the supply of natural gas becomes short and the price rises to the $3-$4 level.

Chronology of Relevant Events

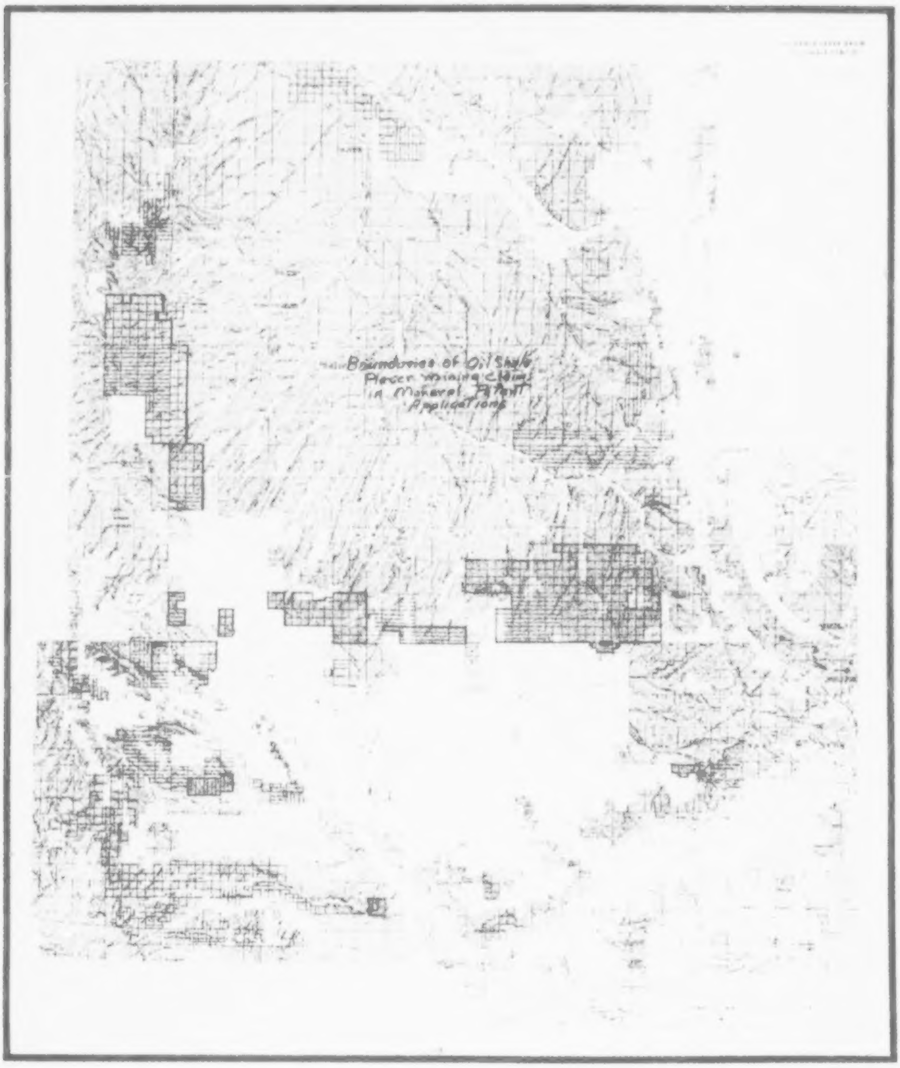
Pre 1920	Oil shale claims were filed.
1960's	Federal government determines that claims are invalid and refuses to issue patents.
1985	*TOSCO v. Hodel*. Judge Finesilver issues a 91 page opinion in favor of the claimants. The U.S. appeals to the 10th Circuit. Briefing schedule never implemented.
April, 1986	*Ertl v. Hodel*. Oil shale claimants file suit. Responsive pleading never filed.
August, 1986	Oil Shale Agreement executed between U.S. and oil shale claimants settling *TOSCO* and *Ertl*.
September 16, 1986	Congress passes amendment to Department of Interior's appropriation bill requiring U.S. to seek agreement of claim owners to a 6 month stay in *TOSCO* and *Ertl* so Congress can review Oil Shale Agreement.
September 19, 1986	Colorado moves to intervene in both *TOSCO* and *Ertl*.
October 13, 1986	10th Circuit (*TOSCO*) hears Colorado's motion to intervene. Judge Finesilver never sets motion to intervene for hearing and never rules on motion.
November, 1986	10th Circuit (*TOSCO*) issues written opinion. Motion to Intervene denied due to lack of jurisdiction. Court holds that the cases were rendered moot by the settlement agreement.
November, 1986	Oil shale claimants refuse to agree to a stay. The U.S. issues some of the patents.
December 8, 1986	Colorado files original proceeding in Washington, D.C. (Complaint and motion for preliminary injunction.)
December 19, 1986	Oil shale claimants file motion to enjoin Colorado in *Ertl* case (Colo. Fed. Dist. Ct.)
December 22, 1986	Colorado delivers two letters to federal district court clerk. One letter withdraws motion to intervene. Other letter advises clerk that Colorado not a party and Colorado does not intend to enter an appearance.

December 24, 1986	Colorado receives copy of Finesilver's December 24, 1986 order continuing matter until January 15, 1987. Parties and others directed to file additional memoranda on January 7, 1987.
January 7, 1987	Colorado delivers another letter to the clerk pointing out lack of personal and subject matter jurisdiction.
January 7, 1987	Washington, D.C. - U.S. files motion to transfer.
January 15, 1987	Hearing on motion to enjoin Colorado. Colorado does not participate.
January 16, 1987	Colorado receives Finesilver's order continuing motion to enjoin Colorado again until February 2, 1987.
January 22, 1987	Colorado files motion for extension of time within which to file its reply in support of its motion for preliminary injunction.
January 22, 1987	Colorado files plaintiffs' reply in support of plaintiffs' motion for preliminary injunction.
January 29, 2987	Order granting motion to transfer.
February 3, 1987	Representatives of the Department of Natural Resources begin negotiations with Ertl Trust on state agreement. Discussions expand to Ertl and Shell as co-owners in September 1987.
February 6, 1987	Colorado files motion for leave of court to file amended complaint and amended motion for preliminary injunction.
February 6, 1987	Colorado files protective responses to defendants' motion to dismiss.
March, 1987	Ertle Trust approaches Union, TOSCO, Exxon and representative of individual claimants concerning interest in a state agreement.
March, 1987	Justice Department proposes prior notification and gubernatorial review period. Interior rejects proposal.
March 26, 1987	Colorado's brief in opposition to the defendant's motion to dismiss.
April 14, 1987	Representatives of the Department of Natural Resources brief Rocky Mountain Oil and Gas Association Oil Shale Committee on proposed state settlement approach.

April, 1987	Unocal comments on preliminary draft agreement.
July 9, 1987	Court directs cross motions for summary judgement.
July 31, 1987	Colorado provides settlement status report to court.
August 4, 1987	TOSCO expresses interest in initiating discussion on state agreement.
August 10, 1987	Both parties file motion for summary judgement.
August 24, 1987	Both parties file briefs in response to motions for summary judgements.
August 31, 1987	Colorado provides reply brief in support of summary judgement motion.
September 2, 1987	Defendants reply to Colorado's reply brief.
October 16, 1987	State testifies before Senate subcommittee on Mineral Resource Development and Production.

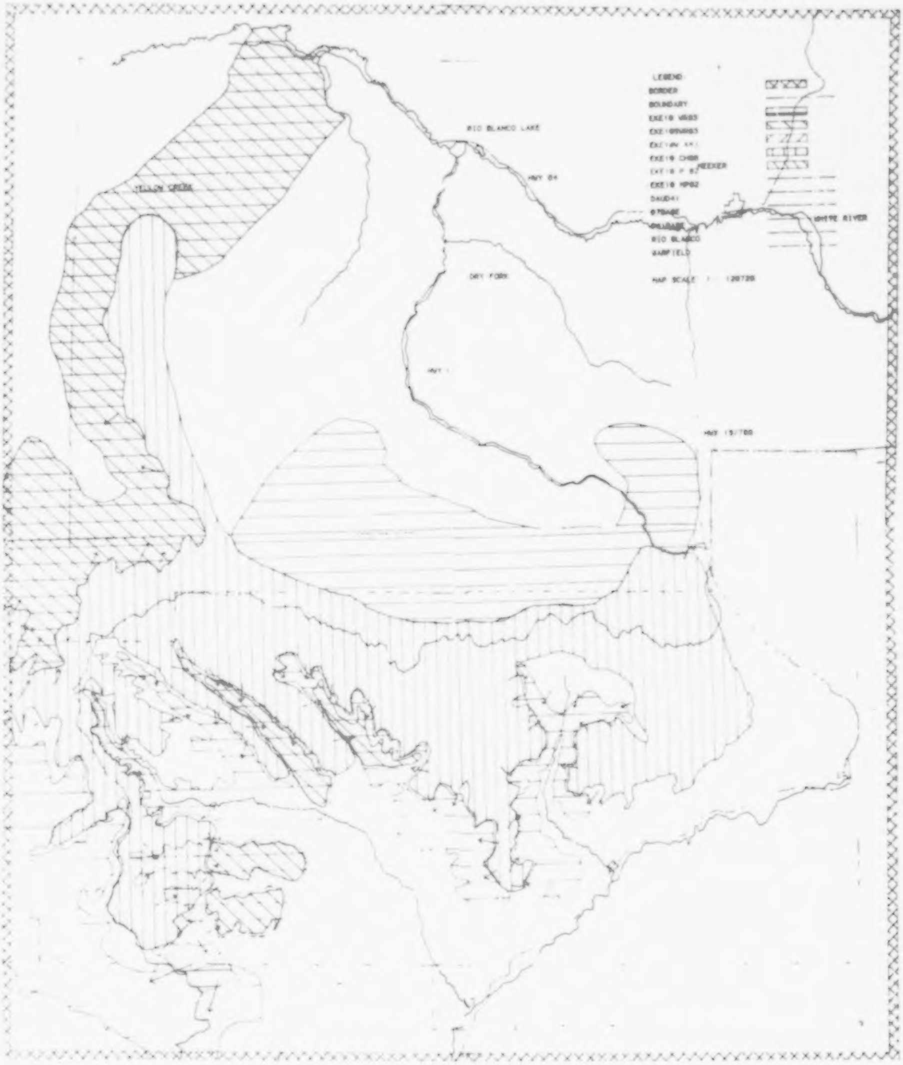
OIL SHALE CLAIMS

BLM SETTLEMENT


Boundaries of Oil Shale
Placer Mining Claims
in Mineral Patent
Applications

MAP 1

OIL SHALE CLAIMS
BLM SETTLEMENT
AUGUST 4, 1986


LEGEND:
BORDER
BOUNDARY
DAUD41
RIO BLANCO
GARFIELD
MAP SCALE 1 : 126720
RIO BLANCO LAKE
HWY 64
YELLOW CREEK
MEEKER
WHITE RIVER
DRY FORK

MAP 2

ELK MIGRATION AND HABITAT AREAS
PICEANCE BASIN

DEFINITIONS OF MAPPABLE BIOLOGICAL FEATURES

Mule Deer and Elk

Winter Range - That part of the home range of species where 90 percent of the individuals are located during a site-specific period of winter during the average five winters out of ten (this period is to be defined by CDOW personnel for each DAU).

Winter Concentration Areas - That part of the winter range of a species where densities are X% greater (defined for each DAU) than the surrounding winter range density during the same period used to define winter range in the average five winters out of ten.

Severe Winter Range - That part of the range of a species where 90 percent of the individuals are located when the annual snowpack is at its maximum in the two worst winters out of ten.

Production Areas - That part of the home range of a species occupied by the females during a specific period of spring. This period is May 15 to June 15 for elk (only known areas are mapped and this does not include all production areas for the DAU).

Highway Crossings - An area within the home range of a species defined by more than [illegible] highway mortalities per mile of highway or railroad per year.

Migration Patterns - A subjective indication of the general direction of the mass movement of migratory ungulate herds.

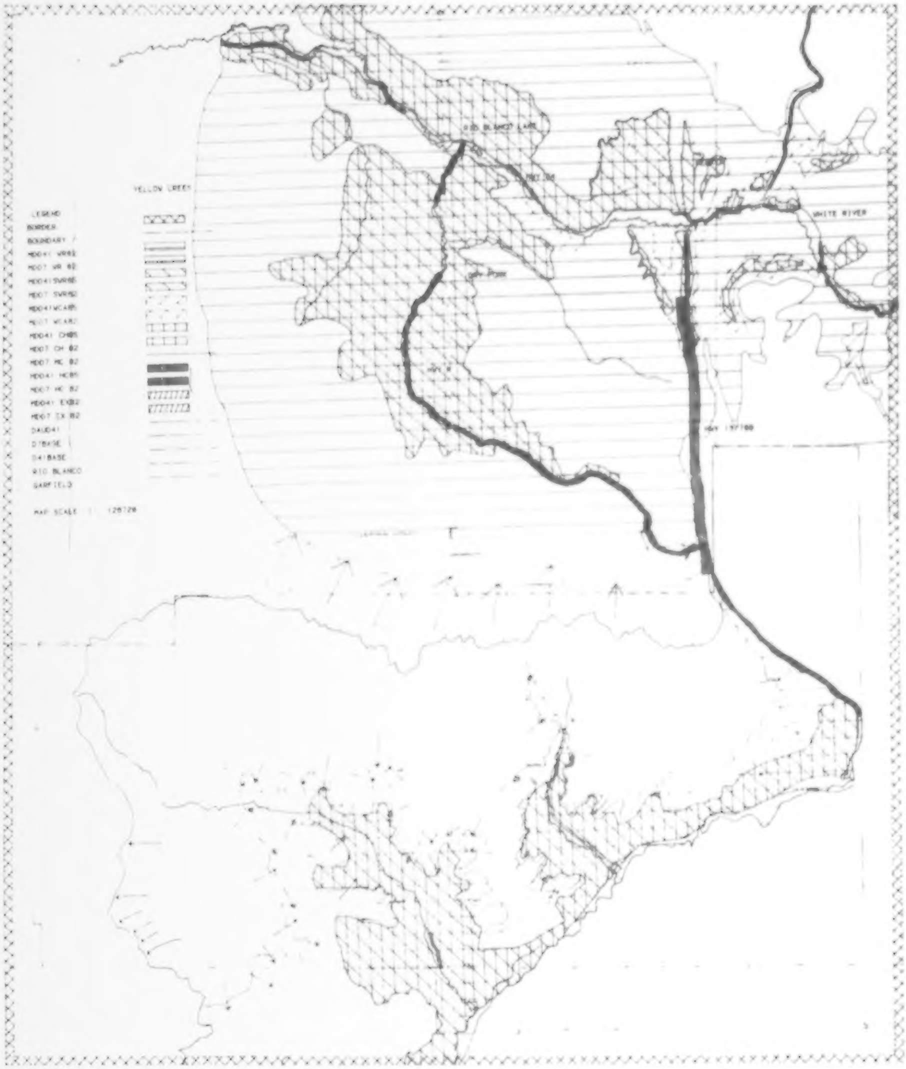
Migration Corridors - A specific mappable site through which large numbers of animals migrate and loss of which would change migration routes.

Critical Habitat - A designation which may be applied to any biological feature mapped for a species, thus indication that within a given DAU, loss of that biological feature would adversely affect that species. Mapping any biological feature does not arbitrarily classify that feature as "critical."

Resident Population Area - Areas with distinct populations of a species that fulfill all biological functions within the area identified. Individuals could be found in any part of the area at any time of the year.

Summer Range - That part of the home range of a species that is not considered Winter Range, including what has tradtionally been known as spring and fall transitional ranges.

[illegible]


YELLOW CREEK
LEGEND
BORDER
BOUNDARY
MDD41 WRB5
MDD7 WR B2
MDD41SWRB5
MDD7 SWRB2
MDD41WCAB5
MDD7 WCAB2
MDD41 CHB5
MDD7 CH B2
MDD7 MC B2
MDD41 MCB5
MDD7 MC B2
MDD41 EXB2
MDD7 EX B2
DAUD41
D7BASE
D41BASE
RIO BLANCO
GARFIELD
MAP SCALE 1: 126720
RIO BLANCO LAKE
WHITE RIVER

MAP 3

DEER MIGRATION AND HABITAT AREAS
PICEANCE BASIN

DEFINITIONS OF MAPPABLE BIOLOGICAL FEATURES

Mule Deer and Elk

Winter Range - That part of the home range of species where 90 percent of the individuals are located during a site-specific period of winter during the average five winters out of ten (this period is to be defined by CDOW personnel for each DAU).

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[illegible]

BEST AVAILABLE COPY

Senator WIRTH. Thank you very much, Ron. We are very pleased to have you here and please thank the Governor for us as well.

You have painted a distressing picture of what the State of Colorado has had to go through to get some input on how these lands are managed under this kind of settlement.

Are there any other unanswered questions that this kind of process raises that we on the subcommittee ought to be aware of?

Mr. CATTANY. There are a couple that I would like to raise.

Obviously, as I have mentioned, the public review process that we believe that is in place under current law was ignored. And that there are needs on the part of the various users of that property that have not been addressed. And it certainly sets precedance for future disposal and management of public lands.

The removal of the land from the public trust is based in this situation, on the way public land was viewed in 1872 and in 1920. And it certainly does not address the competitive uses of those lands today of mining development versus recreation versus wildlife habitat, etcetera. And holding the land for speculative purposes certainly does not recognize those alternative uses.

As I said before, the maximum return on the assets of the public trust has been ignored. And based on some questions earlier today I think there has been a value set on oil shale and that value was set in 1974 when $160 million was paid by the industry in bonus payments to acquire 10,240 acres of land in federal tracts C-A and C-B in Colorado.

Granted those bonus payments were based on an anticipated value for oil shale. But what that really tells us is that we need to price oil shale today based on the value that it is going to be at when that resource is developed, to take into account the life cycle value of that, and the present worth of that type of resource.

Unrestricted latitude in future land uses certainly as I have mentioned is not consistent with the purpose of attaining patents for land use. The impacts on farming, ranching, and hunting have been ignored.

Another interesting issue that is raised is federal land use preemption. Are we setting up a situation here that if the land is privatized and if oil shale is then needed in a national emergency for oil purposes, will we then have to create an energy mobilization board to get access to it. The western states were very clear a couple of years ago about our opposition to federal preemption of local and state land use laws regarding mineral and energy development, and I think that we may be approaching that same type of a trap today.

In Colorado, land use decisions are made at the local level, not at the state level. The State only has control over air quality, water quality and reclamation of mining properties. Beyond that, the use of those lands is guided by local governments. Local governments are as concerned as we are of the preemption of those rights.

There was no economic analysis done on this. We do not know if the patenting of the oil shale claims was a good deal for Colorado.

And finally, we believe that there should be some sort of oversight provision in the implementation of such a settlement, so that before total title to the land is passed in 20 years that there can be some sort of review of the way in which those lands are being used in relationship to how those lands were acquired in the first place.

Senator WIRTH. On the energy mobilization board, that was 1979, 1980, remember I led the battle against that as that would have been extraodinarily deleterious to the State of Colorado and the whole fabric of laws that we have on the books to protect land and water.

Mr. CATTANY. That is correct.

Senator WIRTH. Has there been any effort now by the Department of the Interior to involve the State of Colorado in the controversial 11,000 and 12,000 acres that are coming up?

Mr. CATTANY. Indirectly. Last spring the Justice Department advanced a proposal to the Deputy State Attorney General that would allow for prior notification to the State of future patents that would be issued, and that a 60 day review period would be given to the governor to comments on those proposed patents.

The condition for that, as it was expressed to us, was that Colorado drop its current interventions, legal interventions into this process, and that it not testify on any oil shale legislation in Congress.

Senator WIRTH. Wait a minute. In order to be informed about what they were going to do with public land in Colorado, they said you had to drop the State of Colorado's ability to come and testify on——

Mr. CATTANY. That is correct.

Senator WIRTH. That is, who, was that ever written down?

Mr. CATTANY. It is in, as I understand it it is phone conversations. So it would be notes in phone conversations between the Justice Department, Larry McBride and our then Deputy State Attorney Jan Miller.

Senator WIRTH. When did it happen?

Mr. CATTANY. It happened actually in March.

Senator WIRTH. Of this year?

Mr. CATTANY. About March 17th.

Senator WIRTH. Could we get that information for the record?

Mr. CATTANY. I am sure we could.

Senator WIRTH. Is not that very unusual?

Mr. CATTANY. Well it certainly did put us in a compromising situation. The thing that is interesting about it is——

Senator WIRTH. In other words, the Justice Department was saying to you in order for us to have discussions with you and notify you as to what we might do in the various public lands in the State of Colorado, you have to agree to what again?

Mr. CATTANY. We had to agree to drop our current intervention into the settlement of the 82,000 acres, drop our claims, and we had to agree not to testify on oil shale legislation that was pending in Congress.

Senator WIRTH. These guys really are heavy handed, aren't they?

Mr. CATTANY. Indeed. And the other thing that is interesting about that——

Senator WIRTH. Who was pushing all of this, who is behind all of this?

Mr. CATTANY. You should ask the Justice Department that question.

Senator WIRTH. Who do you think?

Mr. **Cattany**. I, it, our sense at that point was that that was what we were to interpret as our formal communication, either somehow from Interior or from the Administration as the extent to which they were to be willing to be involved with the State in the patenting issues.

It is very interesting that this was also characterized to us as an agreement just between the Reagan administration and the State of Colorado. So that at the end of this administration, any type of an agreement like that would have to be renegotiated.

Senator **Wirth**. What other good stuff is out there like this? [Laughter.]

Mr. **Cattany**. The other thing that is interesting is that we, given the strong bargaining power that the states had so far, we thought that potentially elements of that were not a bad idea. Our new deputy state attorney general later on this summer then contacted the Justice Department to see if the offer or some variation of it was still open. At that point the Justice Department told us that the Department of the Interior was less than enthusiastic about that type of an agreement and that the Justice Department was not really interested in bringing up the concept again.

Senator **Wirth**. And what does that mean?

Mr. **Cattany**. It means, the way that I interpret it is, don't call us, we'll call you, basically. They were just not interested at that point in looking at other ways to provide us with some sort of formal notification as to what was going on.

Senator **Wirth**. And how long have you worked for the Department?

Mr. **Cattany**. Six years.

Senator **Wirth**. So you were there at the time of the TOSCO settlement?

Mr. **Cattany**. I was.

Senator **Wirth**. When the TOSCO settlement was made, when did you hear about it, did you know it was going to happen, did they call you and tell you?

Mr. **Cattany**. Now are you talking about the Finesilver decision or the agreement last fall?

Senator **Wirth**. The agreement last fall.

Mr. **Cattany**. The agreement last fall, the Rocky Mountain News called me and asked me what our comments were on the agreement. And I had to ask them if they had a copy so that we could take a look at them to determine what our comments were.

Senator **Wirth**. And what in the agreement related to wildlife and sportsmen's issues and so on? They were specific items in the agreement, were there not?

Mr. **Cattany**. At this point, as I recall, the Interior agreement just said that there would be reasonable access to those lands for hunting and fishing.

It is not clear what reasonable access means to us, and that was one of the reasons that we felt that it was important for us to clarify that issue. And our approach in doing that was to then deal with the individual claimants to first identify what their definition was, and secondly let them know that we felt our definition was for reasonable access.

Senator WIRTH. The earlier witness, in defending the Interior Department's actions, on the basis of the 1970 lawsuit, said that they could not interpret what the court had meant when the court used words like, the following words, substantial compliance, and consequently they felt they had to go along with it. You might have heard that testimony.

Mr. CATTANY. Yes.

Senator WIRTH. Then the same people came back and said to you that you had to, that they would provide reasonable access. It seems to me that if substantial compliance was fuzzy for them, then the phrase reasonable access is equally fuzzy.

Mr. CATTANY. That is correct, that is the way that we interpret it.

Senator WIRTH. Consistency is of course not the mother's milk of this particular operation.

Have you been able to get Interior to involve the State earlier in cases like this?

Mr. CATTANY. No.

Senator WIRTH. Are there going to be more sales?

Mr. CATTANY. Not at this point, no.

Senator WIRTH. Because you have tried and you have not been successful.

Mr. CATTANY. In terms of future patenting, no. As I said, really our discussions have been through the Justice Department in their informal communication with us last spring and the only other indication that we have had from Interior is an informal, basically gentlemen's agreement that the State director of BLM has given us that when he hears that patents are going to be issued, he will let us know.

Last November when the patents were actually issued, he called us at basically 3 o'clock, actually your office called us at 3 o'clock in the afternoon of the day before it was to occur to tell us that your office had heard through the grapevine that patents were going to be issued the next day.

Then we got in touch with the state director and he said that he would, that indeed it was going to happen. He was going to try to forestall those patents from being issued over the weekend so that we could do any legal action in the court that we thought might be necessary to prevent those patents from moving forward.

Unfortunately that was at 4 o'clock on a Thursday afternoon. At 9 o'clock on Friday morning his conference room was full of attorneys for the claimants and he basically called us up and said that he had no other recourse but to go ahead and issue the patents that day as opposed to holding them for 3 more days.

So as I said, the State office has been very cooperative, but I think that they have been given notice basically within a 24-hour period themselves from the director of BLM as to when at least some of these patents were to be issued.

Senator WIRTH. This thing gets fishier all the time.

Mr. CATTANY. Interesting.

Senator WIRTH. It would be nice to put it that way.

You heard the testimony from the witness from the Department of the Interior, at which point he said that every time they go to court they lose, and that they lost also in *Hickel* v. *The Oil Shale Corporation.*

Earlier in my discussion with Congressman Campbell, I made the point that in fact Interior had won that case. Let me just read some of the language from this opinion.

"On that premise, it would seem that the dicta in Krushnic and Virginia Colorado are not valid." "The perfection of the claims under such laws thus seemingly meant compliance with everything under 30-USC-28, which taken literally would mean assessment work of $100 during each year. Defaults however might be the equivalent of abandonment, and we now hold that token assessment work or assessment work that does not substantially satisfy the requirements of 30-USC-28 is not adequate to maintain the claims within the meaning of Section 37 of the leasing act."

Is not adequate, this is the court saying "is not adequate". Rather, their dicta to the contrary, "we conclude that they must be confined to situations where there have been substantial compliance with the assessment work requirements of the 1872 act so that the possessary title of the claimant granted in the law will not be disturbed on flimsy or unsubstantial grounds."

It goes on to say "The land commissioner's findings indicate that the present claim had not substantially met the conditions of section 28 respecting assessment work." Had not met the conditions. "Therefore, we can not say that Krushnic, the 1930 case, and Virginia Colorado control this litigation."

There is a clear victory for the Interior Department.

Mr. CATTANY. That is correct.

Senator WIRTH. A clear victory. "Our review of the 1937, of Section 37 of the 1920 act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise."

A clear victory for the Department of the Interior.

Mr. CATTANY. It is also our understanding that in one of the briefs filed in one of the lawsuits in 1982 basically substantiated that by identifying 202 of the 525 claims that were patented last year as being invalid due to lack of discovery work or lack of location basic errors in the patenting process as it is outlined in the 1872 mining law.

Senator WIRTH. Anything that you would like to add for the record?

Mr. CATTANY. I think that the only other thing that I would like to mention is that the surface management agreements that we are proposing are relatively simple. They are not mandatory. We are certainly working with the companies on a voluntary basis to enter into these agreements with the state.

But basically they identify about 12 areas that are of concern to us that were not included in the agreements that were entered into last year.

The first is recognition of compliance with existing land use laws. The second is a simple annual report outlining what the potential activities will be on that land for the next 12 months, consolidation of utility and transportation corridors as much as possible on that property to minimize disruption to wildlife habitat and migration patterns, minimization of traffic impacts and traffic patterns in those areas, restrictions on the use of firearms by employees, state consent before any spraying or burning occurs on the land, establishment of grazing standards on those properties, consultation on forest management issues, protection, mitigation and replacement of riparian areas that would be affected by development, free access for hunting, which is what we define as reasonable access, restrictions on road closures in the area, and protection of areas of scenic beauty and natural significance.

And these agreements that we are looking at are agreements that would basically govern the management of that land until development occurs. At the time that development occurs, the development would be subject to the Colorado Surface Mine Reclamation Act, local zoning regulations, and special use permits guiding the development of those properties.

At this point, the first company that came to us and asked to enter into this kind of agreement and basically proposed it, was the Ertl Trust. They have worked in encouraging Union, TOSCO, Exxon, and the attorney for several of the smaller claimants to enter into similar agreements. One of the complications that has developed that was discussed earlier today, was that lands have been sold already that were patented last year.

So we, for example on the Ertl property came up with a basic framework for an agreement which is now having to be renegotiated because land was sold to Shell. And we are having to basically reinvent the wheel which takes more time to resolving the issues and we are hopeful. And by the way, Union oil has also expressed a very strong desire to move forward with us in settling this issue. So we are hopeful that we can reach similar agreements with Exxon and TOSCO.

But there are issues that are clouding up the current development of the properties. The Ertl folks had identified some money to do a test project for asphalt. And their potential sponsors did not want to enter into a financial arrangement with them because there was not clear title to the land at that point because of our pending litigation.

So it is an issue that we want to get resolved. We want to get it resolved quickly. And we certainly want to make sure that next time around we are at the table when these decisions are made.

Senator WIRTH. Ron, thank you very much. We are very pleased to have you here and appreciate the State of Colorado asking you to come back and it is very helpful testimony.

Mr. CATTANY. It is our pleasure. Thank you sir.

Senator WIRTH. We would like to get from you if we might for the record your record of those discussion with the Justice Department.

Mr. CATTANY. Sure, we will do that.

Senator WIRTH. Thank you. Our next witness is Mr. John Savage from Rifle, Colorado.

We will include your statement in full in the record Mr. Savage if you would like to summarize that.

STATEMENT OF JOHN W. SAVAGE, JR., RIFLE, CO

Mr. SAVAGE. Thank you Senator Wirth. It is a very short and concise statement. I had very limited notice of this hearing so I did not have much time to prepare.

Senator WIRTH. We appreciate your being here, thank you.

Mr. SAVAGE. What I would like to do is go through the statement shortly and then try and respond to some of the other questions from my point of view that have been raised this morning.

Basically a little background, I am an attorney living and practicing in Rifle, Colorado. I personally own several, an interest in several unpatented oil shale claims and represent my parents and brothers and other related companies, and also a couple of private clients that also have oil shale interests.

My family has long been involved in oil shale in western Colorado. My grandfather staked claims before 1920 and worked in oil shale throughout his life, held an oil shale patent, the patent on an oil shale retort. My father returned to western Colorado after World War II and worked at oil shale until his death 2 years ago.

My purpose today is to try and bring some of the claim owners view to what we are doing here today. I guess from what has been said earlier, I am the bad guy. I do not feel like a bad guy.

We have tried to comply with the 1872 mining law and the intent of it. And I agree with many people who have said that the 1872 Mining Law is an anachronism and maybe should be changed. But it should be changed perspectively. Our Congress, our government has no right to change the rules on us who have relied on this law for many, many years and done everything that we can to comply with it.

This is much of what Judge Finesilver said in his 1985 decision. Oil shale has been dealt with for many years and administratively the position has flip-flopped with administrations. And so the claim owners have had to look at what the courts have said and try to rely on that, and what administrations have said at some point or another, and then proceed, spend money, spend time and work on these projects.

Then principly in 1960 the whole ball game changed. No change to the law, no change in court decisions, simply an administrative policy change. And since my childhood we have been fighting that, it's now 28 years. It is time for that to end. We do not like to give away what we have got, oil and gas, infringements on our surface rights. But really at this point we have no alternative. We can not continue this fight. I do not want to pass away 30 or 40 years from now the same way my father did, still in this fight.

I want to go ahead and work and try to build an oil shale industry we have been working on all of my life.

Several questions your staff indicated you were interested in, one of which is discovery on these claims, the unpatented claims. Most of the claims and certainly I believe all of the claims that we have an interest in contain massive outcrops of the Green River, the Parachute Creek member of the Green River formation, mostly in the southern end of the basin on the rims and the canyons of Rum Creek, discoveries are quite evident.

There are some claims closer to the middle of the Basin where only the very lean, upper strains of oil shale are present. Assessment work, we have been doing assessment work continuously since 1970 or 1972, Justice Douglas' TOSCO decision and in 1972 the BLM changed the regulation to require annual assessment work.

Assessment work was not done routinely before that by virtually anybody in oil shale based on the 1930–1935 Supreme Court decisions. We did the work that we needed to do to process patent applications. You have to have a total of $500 worth of work per claim done to file a patent application. There are always a number of things that you need to do on the claims. But there was no concerted effort to do assessment work every year, because it simply was not required.

Until you have the financing in place to proceed with oil shale development, relatively meaningless work on the ground does not do the ground or us any good.

A couple of the questions that were raised earlier, throughout the last 18 months or so I have been called a speculator a lot. I guess we are to some extent. We are willing to work on a mineral resource that has no financial viability today. Nobody's crystal ball was good enough to say when it will be financially viable.

The three generations of the Savage family have believed in oil shale. We do not look at the balance sheet. We are there to develop a resource and it does not, we have to make a living and feed our kids, but we are in it to make an industry. And the ultimate faith that it is a valuable resource that will be utilized some day, and we want to be part of that.

There was a reference to the value of these lands and I object somewhat to the characterization of it as a sale, the $2.50 per acre is theoretically a sales price or a filing fee. These lands were not, the Interior Department did not make a decision to sell these lands. They decided to go and proceed with the patenting which they had been fighting very vociferously for 25 years based on massively losing the decision before Judge Finesilver, many of my colleagues in the oil shale legal sphere would probably wince when I say the 1970 decision was a loss to the claimants. There is no doubt about it.

It was a devastating loss to my father. But there was, it was not a good, well written judicial decision, unfortunately, in that, it was a probably compromise but it said some things without completely overruling the 1930 and 1935 decisions. If it had overruled those decisions explicitly, we probably would not be here. But it did not. It left an avenue in there, if you substantially complied with the assessment work requirement, you still had a valid claim.

But substantial compliance was definitely not complete compliance because the 1930 and 1935 decisions were not overruled. Therefore some non-compliance was acceptable. So the question is always what is substantial compliance. And that led to another 15 years of litigation.

Judge Finesilver came down essentially saying substantial compliance was the requirement that you have to have $500 worth of work done before you can obtain a patent.

He also mentioned earlier the 12½-percent royalty, which is the same thing charged on many conventional crude oil and gas leases. As far as I know, nobody in any economic justification ever conceived of a hard rock, basically a hard rock mining business like oil shale of carrying that kind of a royalty rate. You can do it in conventional petroleum, because all you risk is up front is finding the material once you have production your per unit production cost is very, very low compared to the gross value of the material.

But in a very lean ore situation like oil shale, a 12½-percent royalty would make any activity inviable.

Representative Campbell indicated values of $500 to $2,000 an acre. I am not entirely sure whether he was referring just to the surface or the surface and the minerals. As far as surface goes I know of a number of blocks of surface in the area of claims that we have that have been on the market for $200 an acre for the last three or four years and have been totally ignored.

When we looked at, us personally, the Savages, when we looked at the settlement agreement, we were happy to get it, although we did not like it particularly, but our question is how do we afford to hold these lands personally. Although the taxes are minimal, they are there. There are some administrative costs. Their revenue producing capability is virtually nil. A very small amount for grazing and virtually no other values. And so we were looking at having to hold these things as a family for many, many years with no revenue.

Senator Melcher spent some time discussing the presence of a valuable mineral and what he understood that to be. By and large most of us have understood that the 1980 Shell decision pretty much foreclosed that area of argument. And it is what I said earlier, that we are in oil shale because we have a belief in its ultimate value and its ultimate use. Now because we can sit down with a paper and pencil and tell you how much money we are going to make next week on it.

What the Supreme Court in Shell said was that oil shale is without a doubt perspectively valuable. It is a massive resource that the world will need someday. But nobody is, you can take any set of assumptions and decide whether oil shale is valuable or not. But the assumptions are completely arbitrary. I mean when is the next war in the Persian Gulf, when do we have a technological breakthrough in retorting technology, those kind of things.

So there really is no way to financially analyze an oil shale holding at this point. Because you are looking into the future and a change of circumstances that anybody can construct a scenario for with equal validity.

There was also a discussion earlier about legislative reviews of oil shale patent processing. The I guess most famous ones and by and large what the 1980 Shell decision was based on were the 1930 hearing in the Senate. There were also some hearings at the same time in the House of Representatives. Later in modern times, 1955 there was a bill passed that facilitated the patenting of oil shale by removing the requirement that you had to acquire the surface with the surface had been patented to a homestead, grazing act or homestead of some sort before you could get a patent.

Then throughout the 1960's and 1970's, and I do not have any citations or anything to that, but there were a number of both pro-claimant and anti-claimant bills running around. I am not sure whether formal hearings were held but I know that several were proposed. In 1978 I was on the Hill, I worked for Senator Haskell for 3 months. We worked on an oil shale, something called a GOCO program for an experimental oil shale plant and the status of unpatented oil shale claims were a topic of discussion routinely at that time also.

The proposal that we pay current values for these properties simply means that anybody but the major oil companies is out of business. Our approach to the business has always been that we can do the things that take time, sweat, and intelligence. We can not do the things that take money, because we do not have any.

Our position has always been to acquire a, some of the resource, you trade some of that off for money or financing or something for projects, and then go ahead and build our one or two oil shale processing projects. But anybody familiar with the early history has seen some of the stock promotions and back in the days before the crash in 1928 or whenever it was when the stock market was a wide open affair, there was lots of speculation on all kinds of minerals and certainly oil shale had their share of it.

You can not do that these days. Neither do you want to. I would not sell anybody an interest in an oil shale project today unless they really had some money and they knew where it was going and they did not have any need for it. Because you cannot build a financial scenario about how that money gets paid back today.

Senator WIRTH. Let me if I might ask you a couple of specific questions.

How many claims are you involved with in Colorado?

Mr. SAVAGE. About 140.

Senator WIRTH. Yes.

Mr. SAVAGE. We do not, if I can digress a little bit, my parents in the 1950's, we did not end up with, my grandfather did not survive the depression with any of his, the properties that he had located. Dad went back after World War II and started acquiring bits and pieces from locaters around there, our general deal with people, his deal with people was I will take your interest, perfect it, I get half, you get half.

A few interests he bought outright, but very few.

Senator WIRTH. Prior to 1979 was assessment work done on each one of your claims each year?

Mr. SAVAGE. From the early 1970's to, yes.

Senator WIRTH. Prior to 1979 it was done on each one of the——

Mr. SAVAGE. From the mid 1970's, not before that point.

Senator WIRTH. Not before the mid 1970's.

Mr. SAVAGE. Yes.

Senator WIRTH. Do you have to file with BLM proof of the kind of labor that is done on each one of these?

Mr. SAVAGE. No. Generally the requirements which came out I think in October 1978 only require a filing of the copy of the affadavit assessment work that was filed with the county which basically states the work was done generally except in the case of——

Senator WIRTH. Is that every year?

Mr. SAVAGE. Yes. Except in the case of geologic reports.

Senator WIRTH. So FLPMA requires you to file with BLM a report of what work you have done each year on those claims, is that right?

Mr. SAVAGE. Normally it is filed on an affadavit that says you did the work. It does not include any detailed description of what you actually did.

Senator WIRTH. Have you filed that in every year?

Mr. SAVAGE. Since the early 1970's, yes.

Senator WIRTH. Who do you file that with?

Mr. SAVAGE. It is filed with the county clerk and recorder under the state statute, and since FLPMA, it is filed with the BLM.

Senator WIRTH. Since 1975 it is filed with the BLM?

Mr. SAVAGE. Yes.

Senator WIRTH. So that BLM would have a record of all of your claims for the year?

Mr. SAVAGE. I believe the first couple of years they were taking everything and filing it. Since then or since the early 1980's I think they simply note it on a computer print out or something that it was filed. I think that the volume of the paper work was overwhelming them. I do not believe they have an actual copy of what has been filed. They have a notation that it was filed.

Senator WIRTH. They have some record of that?

Mr. SAVAGE. Yes.

Senator WIRTH. I was noting your testimony, I appreciate what you were saying about the industry and I do not disagree with that at all. The shale's value could be very significant and it should be part of a long-term national energy policy. I agree with you completely. I agree with you also that there are some ambiguities that are left in the law and in the management of the law. And you have gotten caught between a rock and a hard place in many ways in this.

You said, in opening your testimony, you are the bad guy, you are doing what you think is an appropriate thing to do within an ambiguously managed piece of legislation. And I think that ambiguity is no greater than in the Interior Department, which said it was not going to appeal the *Finesilver* case. They were not going to carry the case forward, even though the local people, the Department's Colorado attorney said the "district court improperly held that once $500 worth of work had been done at any time the requirement of continued assessment work is forever told. The district court reaches that decision by an inpermissable combining of sections five and six of the general mining law."

As we have already seen, section five expressly requires that "Until a patent has been issued" a mining claimant must do $100 worth of work each year on each claim in a way that tends to develop the claim for mining purposes.

Interior has the responsibility for managing this land in the public interest. You get caught again between a rock and a hard place if you are hearing one thing for a period of time and another thing for another. I do not, we are not in the business of saying you are the bad guy. You do what you think is the appropriate thing to do. It is Interior's job to manage this law and manage these public lands in the public interest.

The point that I would make is one, they have not done that and have been delinquent in doing so, and the trail that we have uncovered this morning I think is pretty stark evidence of that.

But second, we have the job of trying to figure out how we can write legislation to clear up all of these ambiguities in the fairest way possible to all of you as well. I think there are some major public policy points of view here when we talk about a sale at $2.50 an acre. We can debate whether it is a sale or not a sale, but the idea of land being sold anywhere for $2.50 an acre, when there are thousands of acres and then turned around and sold as Congressman Campbell pointed out in his testimony for vastly more than that, something is wrong.

Something is truly amiss, and we want to figure out how to make sure that that does not happen again and the public is protected and that you all who have a stake in this are protected.

We really appreciate your coming in, we thank you very much for being with us, and we will look forward to soliciting your reactions to draft legislation and looking forward to working with you as we go along. Thank you for coming in.

Mr. SAVAGE. Thank you.

[The prepared statement of Mr. Savage follows:]

STATEMENT OF JOHN W. SAVAGE, JR.
TO U.S. SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
10/16/87

Regarding oversight hearings on Department of Interior handling of unpatented oil shale claims.

Thank you for affording me the opportunity to present one claim owner's views on the present status of unpatented oil shale claims.

I am an attorney, living and practicing in Rifle, Colorado at the southeastern edge of the Piceance Basin oil shale area. I personally own an interest in several oil shale claims and represent my mother, Joan L. Savage; my brothers, Roy, Marshall, and Daniel; JoJo Oil Shale Company; Savage Oil Shale Development Company; and several other individuals who own unpatented oil shale claims.

I was born and raised in Western Colorado at the foot of the oil shale cliffs. My grandfather located oil shale claims in the era 1915-1920 and worked on some of the early projects. My father came back to Colorado after serving in World War II and worked to build an oil shale industry. I have worked on oil shale perfecting claims, doing assessment work, preparing patent applications, working on oil shale technology and oil shale litigation since early childhood.

My purpose today is to try to impart to you some sense of the equities involved in this issue, who we are, and what we are trying to do, and why our claims should be patented.

The long technical and legal history of the oil shale issue is beyond the scope of my presentation today. It is enough to say that our unpatented claims were located under the 1872 mining law and held under that law. Those rights were routinely acknowledged by the issuance of patents until 1960 when, with no change in the statute, my government attempted to deny those rights. After 25 years of fruitless litigation, the cases were settled.

We didn't like the settlement but had no alternative and feel that our remaining claims should be accorded similiar treatment.

One of the frequent questions asked is why didn't we file patent applications for 25 years? The answer is simple. We were forced by an implacable bureaucracy determined to deny all our claims. Our resources were going into the ligitation and there was no justification to expend resources we didn't have to prepare additional applications when pending applications were being denied.

We did not abandon these claims. Work proceeded on oil shale technology, clearing titles, resource evaluation, and water and land acquisition. After the 1970 TOSCO decision and 1972 change of BLM regulations requiring regular assessment work, it was and has been done annually. This work has included geologic evaluation, sampling, minor road building and maintenance, assessment pits and other claim work.

Since the settlement in August, 1986 and issuance of some patents, we have begun work on preparing patent applications for our remaining claims. It is a slow and laborious process that must be done when time and money permit. I expect to file a dozen or so applications over the next several years.

Your staff has advised me that one of the questions you have is regarding discoveries on these claims. Virtually all of the remaining unpatented claims have massive outcrops of the Parachute Creek Member within the boundaries of each claim. Those few that don't are within a short distance of the cliffs and have some outcrops in gulches within the claims.

Much has been made recently of the loss to the public when oil shale claims are patented. It is true that there has been a transfer from the public domain to private ownership -- hardly a capital crime in this country and that is what the 1872 mining law was intended to do. It may be time to change that law, but only prospectively. This country is governed by laws and those laws give me and my predecessors rights to these lands. It is not right, legally or morally, for you to take those rights away.

We have spent a fair amount of time in the last year and a half justifying our ownership of these lands. We have explained that we really are trying to produce oil shale and that we don't want the lands to build condos. But really those are not the issues. The issue is whether or not we are entitled to ownership of these lands under the law. That right has been confirmed by the courts time and time again. How long must I fight my own government for what is right? How many trips to Washington, D.C. must I make?

There has been a lot of concern expressed in Congress for the rights of the public but I haven't heard very much about my rights. I am a United States citizen, I am one of your constituents, Senator Wirth. I hunt, fish, and graze cattle but somehow my rights, as an oil shaler, come last, if at all.

It appears likely that some legislation will result. I think a fair resolution would be to accord unpatented claims the same treatment that was afforded the claims subject to the settlement agreement with an outside time limit for submitting patent applicatons. This would give the oil shalers the resource they need and settle this dispute once and for all.

This has been a very short statement. I had very little notice of these hearings and was unable to prepare a more lengthly presentation. My main reason for coming was to be able to answer any questions the committee may have.

Thank you.

Monday, March 30, 1987

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The Daily Sentinel

Founded in 1893
A Cox Newspaper

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The Sentinel's editorials

Ben's 'special interests'

Before last week, the John Savages of Rifle, the Frank Cooleys of Meeker and several other longtime Western Colorado families probably never considered themselves "special interests" which routinely are capable of manipulating Interior Secretary Donald Hodel as a "tool" for their own greedy self-aggrandizement.

Well, that's exactly what Savage, Cooley *et al.* found out about themselves last week from their very own congressman, Colorado 3rd District Rep. Ben Campbell.

In a war of words that began when Hodel charged Campbell with doing the legislative bidding of "Washington bureaucrats," Campbell, in turn, ripped Hodel as "a tool of the special interests."

Hodel's transgression, as Campbell sees things, is the Reagan administration's opposition to Campbell's bill that seeks to halt the transfer of more than 80,000 acres of unpatented oil shale claims to private owners. Hodel believes that the acreage should be treated similarly to the Oil Shale Settlement Agreement hammered out last summer under the purview of 10th Circuit Court of Appeals Judge Sherman Finesilver.

Under that agreement, the federal government managed to salvage what clearly was a losing hand. Finesilver previously had ruled against the federal government in a lengthy court suit over pre-1920 oil shale claims. But under the settlement agreement, the federal government was permitted to retain oil, gas, coal and surface rights to the disputed Piceance Basin acreage. The private claimowners, in turn, were finally assured of the oil shale rights they had filed for in the early part of the century.

As might be expected, the settlement agreement ignited howls of indignation from the usual quarters. Land giveaway! Rip-off! Speculators fleece public! You get the idea.

We tend to take an opposing view — i.e., that the settlement agreement represented an honorable end to a drawn-out dispute, an end that benefited both parties.

Campbell, obviously, subscribes to the first, not the latter, interpretation. In that, he is at least consistent with his congressional campaign position, if not the position he advocated as a Colorado legislator favoring a speeding resolution to the controversy.

As for Campbell's idea of "special interests" — well, that perspective might be easier to sell if those "special interests" only included those big nasty oil companies such as Exxon, Union, Mobil, etc. Somehow the Cooleys, the Savages, the Andersons, the Ertls and the like don't fill the role of greedy "special interest" as well as a big, fat oil company.

We suspect that the vast majority of Western Slope residents would agree.

Glenwood Post, March 25, 1987

# of implementing shale settlement

Argument in favor

My Side

John W. Savage Jr.

LAND GIVEAWAY! FOR SALE SIGNS ON PUBLIC LANDS! CLUB MED IN THE PICEANCE BASIN! SECRET NEGOTIATIONS!

Great headlines sell newspapers and get votes but do they tell the truth?

The politicians and headline writers have had a field day with the August 4, 1986 settlement of the unpatented oil shale claim litigation, but the true story has not been told. Years of commitment to an oil shale industry and years of litigation against arbitrary and capricious administrative legerdemain don't make great headlines but they do make great facts.

The Savage family does have a large stake in oil shale and will profit from favorable resolution of the oil shale controversy. However, since our elected representatives and the press are unable or unwilling to explain to the public the true state of affairs, it is left to interested parties to correct the record.

First, I will give a brief history of the issues and then discuss the settlement and legislation being proposed.

Oil shale was a locatable mineral until the passage of the Mineral Leasing Act (MLA) of 1920. This means that a person could locate a claim and acquire title to oil shale lands in the same way that homesteaders and gold miners did, and to some extent, still can. Virtually all private land in the West was obtained from the Federal Government by homestead or mining patents.

The Mineral Leasing Act of 1920 made oil shale, oil and gas and several other minerals subject to leasing rather than outright transfer to private ownership but provided that any mining claim located prior to the passage of the Act remained valid.

From 1914 to the mid 20s, many oil shale claims were located and a number of oil shale processing plants constructed. A percipitous drop in oil prices caused the shutdown of all these early plants and patenting of claims and technology research continued.

Two U.S. Supreme Court decisions in 1930 and 1935 confirmed the claimowners' rights and land patenting and research continued with a resurgence of activity and patenting in the 50s.

By 1960, approximately 350,000 acres of oil shale claims had been patented. The Bureau of Mines research facility at Anvil Points was operating. TOSCO was working on its Colony Project. Union Oil was building and operating its "Rock Pump" retort on Parachute Creek and others were quietly working on oil shale technology.

In the late 50s, a number of patent applications were filed by oil companies and individuals including the Savages. These patent applications expected to be treated the same way they and others had been treated for 40 years. The Department of Interior decided, however, that although there had been no change in statutory or case law, they would arbitrarily contest all oil shale patent applications. What followed was 25 years of litigation that culminated in Judge Finesilver's decision on May 1, 1985 completely repudiating every legal theory advocated by the Federal Government.

While the claimowners were pleased with the decision and the Government filed an appeal, both sides were weary of the endless litigation and commenced meaningful settlement negotiatins with the ever-present prodding of Judge Finesilver. Governor Lamm was briefed on the Finesilver decision shortly after its issuance and told settlement negotiations were contemplated. The Colorado legislature passed a joint resolution encouraging the parties to settle the long-standing litigation and regular status reports were made to Judge Finesilver regarding the status of negotiations. These court reports were and are open to public inspection.

Settlement negotiations commenced in late summer of 1985 and continued through the winter of '85-

86. The 10th Circuit Court of Appeals, while continuing to grant extensions on the briefing of the Government's appeal, made it known that it would not do so indefinitely. In the summer of 1986, various parties advised congressional delegates of the progress of negotiations and Governor Lamm was notified that a settlement was near.

Finally, on August 4, 1986, the parties, working against a 10th Circuit Court of Appeals deadline, finalized and executed the Settlement Agreement. The claimowners, entitled to full patents under Judge Finesilver's decision, agreed to give back to the Federal Government and the public, all rights to conventional oil, gas, and coal, and agreed to continue current surface uses — grazing, hunting, and recreation until the claims were mined.

The Settlement was a good deal for both parties. The claimowners gave up their oil, gas, and coal, and absolute control of the surface they were entitled to under the mining law but got the oil shale and security of additional litigation. The Federal Government got back the oil, gas, and coal they had lost and assurance of continued surface uses. They gave up the oil shale and surface ownership in return for avoiding the possibility of losing everything if their appeal failed, which appeared likely, and the establishment of adverse legal principals in higher courts.

Yes, 82,000 acres of public lands were transferred to private ownership but it was not a sale or a giveaway. It was a vindication of the claimowners' rights granted by the 1872 mining law.

In addition to the 82,000 acres affected by the settlement, there are another approximately 80,000 acres of unpatented oil shale claims in Colorado that should be treated similarly. Patent applications for these claims would have been filed many years ago but for the Government's 25 year effort to invalidate all claims. It simply made no sense to continue to spend money to process patent applications when other identical claims were being contested. Most claimowners are quite willing to accept the 1986 Settlement Agreement for these remaining claims.

There is legislation now pending before Congress to illegally and immorally deprive us of these remaining claims. These claims are our property no less than the lot your house sits on is your property. We are not trying to steal public lands or raid the public treasury. We are only trying to acquire what the laws of this country have said is ours for many years.

Even if all unpatented oil shale claims are patented to private owners, the public will still own 85 percent of all the oil shale in Colorado, Utah, and Wyoming.

Many allegations have been made that we intend to take these lands and use them for other uses, that we're really not interested in oil shale. The truth is that these lands simply have no other value. Of the more than 300,000 acres of oil shale lands patented since 1920, in Colorado, there is not one instance of any development of these lands that is not related to grazing or oil shale processing. Grazing fees only pay the property taxes, and hunting, if controlled at all, only yields a dollar an acre per year.

Representative Campbell's House bill is unfair and unconstitutional. This bill would, 60 years after claimowners were granted a property right, attempt to take it away without compensation and without moral right.

The Savages, Ertls, Andersons, Priens, Altenberns, Smiths, Meserves, Huggs, thos individuals who formed TOSCO, Union Oil, and many, many others have poured the sweat, blood, and toil of generations into the dream of an oil shale industry. We are not quick in, quick out speculators after a fast buck; we are here for the long haul to give birth to a new industry to make this country energy self-sufficient.

Please tell your Congressman and Senator to allow the oil shale settlement to be implemented and let us get on with solving the technological, financial, and environmental problems of the oil shale industry.

John W. Savage Jr. is an attorney at law whose practice is located in Rifle.

Senator WIRTH. Our final witness this morning is Mr. Thomas Lustig, director and senior staff attorney for the National Wildlife Federation.

Mr. LUSTIG. We will include your statement in full in the record Mr. Lustig as you know, and you might introduce your associate.

STATEMENT OF THOMAS D. LUSTIG, DIRECTOR AND SENIOR STAFF ATTORNEY, NATIONAL WILDLIFE FEDERATION, ROCKY MOUNTAIN NATURAL RESOURCE CLINIC, BOULDER, CO

Mr. LUSTIG. Mr. Gawell is a lobbyist with the National Wildlife Federation at the Washington D.C. office.

Senator WIRTH. Lobbyist?

Mr. LUSTIG. Legislative representative. And not here today, but here in spirit is Kathleen Zimmerman, one of our staff attorneys who worked a good deal on the portion of our testimony dealing with the constitutionality of the approach taken in H.R. 1039.

Senator, I come here not only as an attorney for the National Wildlife Federation but I had the privilege of being your attorney and Senator Melcher's attorney and representative Udall's attorney, and also Senator Metzembaum's attorney in our attempt last year to litigate and stop the settlement agreement.

Senator WIRTH. Thank you.

Mr. LUSTIG. Well I lost. And that is why it is so important that we are here today, because one thing that I want to speak about is it is not so critical as to who won or lost, whether it was our attempt in the settlement litigation or whether it was Hickel in the 1970 case or the 1980 case or the 1930 case. It is not important who won or lost, the important thing I think with this committee is doing, is how do we proceed from here.

The only thing that need constrain the Congress is what is constitutional and what is fair. The courts have more constraints than that. So if I can take a few minutes and talk about six reasons, most of which we have already touched on about why I think that it is essential that Congress act, and then if you have questions on the constitutionality of Congressman's Campbell's and Rahall's approach, I will be happy to delve into that, although it is covered in some detail in my testimony.

The six reasons I think lead off with something that you have been suggesting and probing at, and that is that these oil shale claims, both the 82,000 acres that are already gone and the ones currently pending are infected with illigitimacy. There are many scandalous elements of these claims that have barely been brought to the light of day and in fact I fear that unless someone looks at them soon that they will be lost in the dusty history of administrative and judicial law and no one will ever discover some of the faults.

The illigitimacy, there are many aspects of it. You have touched on one of them and that is the consistency of annual assessment work and I need not go into that. We have directed missions that for many, many years assessment work was simply abandoned.

There is another aspect of the illigitimacy and that has to do with whether the claims were properly located or whether it was simply an outlandish fraud upon the government. And this has only been probed into a little bit, but let me quote very briefly from a 1982 decision of an administrative law judge of the Department of the Interior. He said "The evidence presented by the Department is sufficient to constitute proof that hundreds if not thousands of oil shale claims, many of which have since gone to patent were fraudulently located. The circumstances at the time these claims were located was an open invitation to fraud. That is a 1982 decision.

Now in that decision, in the specific claims before the administrative law judge, the judge held that the government had proven that there was enormous fraud but they had not accurately applied it to these claims. And so he let those claims go forward. But the sad thing is, as admitted in recent letters from Assistant Secretary Griles to Chairman Rahall is that there has been no pursuit of this fraud. And in fact in the TOSCO litigation it pretty much fell to the wayside.

So that is the second aspect of the illigitimacy. The first being the question of assessment work, the second is they are infected with fraud.

The third is, the third infection is something else we have touched on, and that is the question of the valid discovery. As you know, because these claims are grandfathered, they had to be valuable discoveries at the time they were located, which had to be before 1920. And the valuable location there is an area of great controversy. I want to suggest, rather than try and dig into this conumdrum, suggest here only that recent statements from the Secretary of Interior again through Assistant Secretary Griles to Chairman Rahall suggest that the Interior Department is willing to take an extraodinarily lenient approach to the question of was there a discovery of a valuable mineral there.

For example, Assistant Secretary Griles says that they are proposing that a valuable discovery be based on a quantity of oil shale in the rock equivalent to three gallons of oil shale per ton of rock.

Now that is extraodinary because common oil shale that is mined contains between 30 and 70 gallons per ton. No one has ever suggested here or in Scotland that we ever mine oil shale of less than 25 gallons per ton. And geologists say that it is almost impossible to distinguish common limestone and shale from oil shale at less than 3 gallons a ton. They cannot differentiate it from just ordinary rock.

So that is the third element that I think infects these claims. And all put together along with other things that I will not deal with now, suggest there is a great deal of illigitimacy out there, yet we continue to patent it.

That is the first reason why Congress should act, because of the illigitimacy.

The second that I want to touch on is that I fear that the Interior Department has really lost its stamina and dropped the ball. So it is important that Congress step in and pick it up. There is a lot of evidence about it, even if one does not go back to the hotly disputed settlement agreement and to the arguments about whether the Finesilver decision should or should not have been appealed. Leaving that aside, what is the Interior Department doing today.

I have already suggested that Assistant Secretary Griles suggests that they accept as a standard this extraodinarily and almost unbelieveable standard of 3 gallons of shale oil per ton of rock as to what should have happened in 1920. It is almost unbelievable that they would suggest such a lenient standard.

In addition, in recent correspondence between the Department and the House Committee, Assistant Secretary Griles suggests that as far as annual assessment work, that they are willing to forgive all failures of annual assessment work prior to 1972 and they are willing to concede that any oil shale claimant who may have had an enormous lapse in assessment work but who has reinitiated that assessment work before the government can intervene, that all those circumstances be allowed to proceed to patent.

Now I think that the law in this matter is difficult and complex, but what concerns me is that the Interior Department is not being the champion of public lands. And Assistant Secretary Griles and the Department says and we heard the testimony from Interior this morning, we do this in the name of equity, it would simply be inequitable for us to be a strong champion of public lands now.

Well, equity of course requires two sides, and I have difficulty saying that the Interior Department should bend over backward to be equitable when there is so much ligitimacy in question about the equity of the oil shale claimants themselves and what they have been up to since 1920 and whether they even comply with the law to begin with.

So that is the second reason why I think Congress must act. Because the Interior Department is not doing its job and it is incumbant upon someone else to do it.

The third reason I think Congress should act is because the courts are not going to solve the problem. We discussed extensively the long line of Supreme Court cases and the fix that they have gotten us into now. Basically court decisions have awarded oil shale a unique status amongst all minerals. They are extraodinarily liberal principles, we talked about them, valuable discovery, perspective discovery, annual assessment work. They are in a unique situation because of the judiciary and in part because as Senator Melcher said earlier, of Congress' past failure to act.

The, some have suggested that the settlement agreement and under it the vacatur of the TOSCO opinion means that things are fine now, we have gotten rid of the TOSCO opinion. But as I discuss in my written testimony, merely because Judge Finesilver's opinion was vacated is not any assurance that Congress can sit back and assume that things are going to go well.

Unfortunately, too many times vacated opinions have been cited, that has happened in the oil shale cases. Unfortunately we have no assurance that these future claims will not come again before Finesilver and he may apply the same criteria.

Senator WIRTH. I do not think that the question is should the Congress act or not. We are going to. Everybody has agreed with that, that is not the issue anymore. The issue now is how do we do that in a way that is the most equitable.

Mr. LUSTIG. Well let me shift to that.

Senator WIRTH. If you could do that in summary, that would be great.

Mr. LUSTIG. The summary is very easy, because the proposal on H.R. 1039 I think easily passes constitutional muster. There are basically two choices. You can obtain a lease or you can proceed and you can continue to operate your claim, and there may be an increase in the amount of annual assessment work that you have to do.

Now the minority view and Senator Wallop has suggested that that may be unconstitutional, but it is clear from a number of circuit court cases that Congress may absolutely eliminate the right to obtain a patent as the House bill suggests.

Oil shale claimants do not have a right to obtain a patent. They have a right to continue to work the claim, and the legislation does not abolish that right. There is no taking. They have a claim, they may continue to hold the claim. They may continue to operate it, they just may not get a patent. And that has been upheld several times before and Congress has frequently done it in other legislation, eliminated the right to get a patent. So that is constitutional.

Second, can Congress raise the amount of assessment work, the answer again is clearly yes. Congress is basically a landlord of these public lands, and there are many cases, including a recent Supreme Court case dealing with FLPMA that suggests that Congress can increase the requirements and tighten up on them, and there is no doubt about it.

Remember that the $100 was set in 1872, and one thing Congress could fairly do is index that for inflation. The House report suggests that $5,000 minimum per year per acre might be an adequate amount, and I think that that may well be in the ball park.

So that is a brief summary. I think that there is very little question that the House approach is a solid one, and a clearly constitutional one.

[The prepared statements of Mr. Lustig and Mr. Gawell follow:]

Working for the Nature of Tomorrow

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TESTIMONY OF THOMAS D. LUSTIG
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Boulder, Colorado

BEFORE THE

SUBCOMMITTEE ON MINERAL RESOURCES DEVELOPMENT AND PRODUCTION

OF THE

SENATE COMMITTE ON ENERGY AND NATURAL RESOURCES

On the processing of oil shale mining
claims and patents by the Department of the
Interior under the mining law of 1872.

and
On H.R. 1039 -- To Amend Section 37 of the
Mineral Lands Leasing Act of 1920
relating to Oil Shale Claims.

16 October 1987

Chairman Melcher, members of the Committee. My name is Thomas Lustig and for the last eight years I have been a public lands lawyer for the National Wildlife Federation, the nation's largest conservation-education organization. At present, and for the last three years, I have been the Senior Staff Attorney in the Wildlife Federation's legal office in Boulder, Colorado.

Just one year ago I had the privilege of representing Chairman Melcher, Senators Wirth and Metzenbaum, and Representatives Udall and Rahall, along with the National and Colorado Wildlife Federations before the United States Court of Appeals for the Tenth Circuit. We attempted to block the oil shale settlement agreement, through which the Department of Interior turned over 82,000 acres of public land to private ownership, rather than prosecute an appeal of a District Court's opinion awarding patents to the oil shale claimants.

While we were unsuccessful in our appeal, the 10th Circuit never ruled that the Interior Department was right in settling the case. Rather, our inability to intervene was because we trusted too well and for too long in the diligence of the Interior Department to prosecute the appeal. By the time we realized a deal had been cut, it had been crafted so that Congressional and public interest participation was precluded.

I appreciate the opportunity to appear before you today, and hope I might provide some insight into the unique and egregious circumstances behind present day disposal of oil shale lands in Colorado, Utah, and Wyoming and why this distorted and unaccountable process cries out for a Congressional remedy.

WHY CONGRESS NEEDS TO ACT

I would like to touch on six reasons why Congress must intervene to insure that oil shale-development does not continue to be a public lands giveaway program. Only Congress can set its own, badly distorted record straight; only Congress can reaffirm that the mining laws were intended to produce valuable mineral and energy resources for the nation, not to assist those wishing to engage in land speculation. If Congress fails to intervene, there will be a continued transfer of federal lands to private developers, who have little interest in managing them for the public benefit or for their multiple public uses.

A. CONGRESS MUST ACT BECAUSE MANY OIL SHALE CLAIMS ARE ILLEGITIMATE.

The first reason for Congress to intervene is because many of the present oil shale claims are riddled with deceit, noncompliance, and sham maneuvers. There have been many credible charges that current oil shale claims and the recent patents issued by the Department of Interior to 82,000 acres of Colorado land are infected with legal and moral infirmities. Sadly, these allegations, hardly exposed to daylight, will soon be lost in the dust of administrative and judicial history. Past abuses will be tolerated only because they are too distant to be recognized.

Before that happens, let me try to list some serious allegations that have never been laid to rest.

(1). **Fraudulent locations.**

While there have been repeated charges that the oil shale claims were fraudulently located, this has been only partially investigated. For example, in a memorandum entitled "Litigation History" prepared by the Department of the Interior as part of a February 18, 1987 Congressional briefing package, Interior notes at page 3 of Enclosure 1 that in the recent Colorado litigation paving the way for the 82,000 acre land disposal:

> No allegations were raised concerning failure to follow proper advertising or of irregularity in the conveyance of title of the claims. In one contest, an allegation that claims were not physically located on the ground was dismissed by the Administrative Law Judge. No other fraud allegations were raised.

In the one administrative contest in which the allegations of fraud were raised, the Administrative Law Judge concluded:

> the evidence presented by the Department is sufficient to constitute proof that hundreds, if not thousands of oil shale claims, many of which have since gone to patent, were fraudulently located. The circumstances at the time these claims were located was an open invitation to fraud. Decision of Administrative Law Judge Rampton in United States v. Weber Oil Co., July 16, 1982, slip op. at 154.

Moreover, the fraud claims were dismissed only because the government failed to prove the specific claims in issue had been located fraudulently.

Other allegations further call into question Interior's limited inquiry into fraudulent claims. For example, a February 1987 report to the Committee on Appropriations, U.S. House of Representatives by the Committee's Surveys and Investigations Staff discusses and quotes from a 1918 General Land Office investigation in Colorado:

> We find that much of the oil shale lands in Western Colorado is covered with placer locations, and in many cases there are locations over locations. We are informed that north of DeBeque, Colorado, some tracts of oil shale lands have been located a dozen times.
>
> . . .
>
> We find from the Garfield County records at Glenwood Springs, that the same association of eight or ten names has been used a great number of times for the purpose of accumulating oil shale placer locations, evidently for the purpose of speculating in same, that is selling out at a profit to other speculators or to bona fide purchasers.
>
> . . .
>
> In many cases the "accommodation" locators have never seen te land upon which they are locating and have not paid their share of recording fees, same having been attended to by the "head" locator. Several civil engineers or surveyors at Glenwood Springs appear as being interested in oil shale placer locations in such large numbers, that it would appear to be out of the question of their ever doing all the required assessment on them; and even if they did and obtained patent, they would have more shale than they could work in a thousand years.

(2). The initial failure to make a discovery of a valuable mineral.

Oil shale lands may be only patented if there was a discovery of a prospectively valuable oil shale deposit by 1920. Yet there has been substantial leniency and great confusion on what constituted such a valuable deposit.

Now the Interior Department suggests a standard that could hardly be more lenient. In a July 13, 1987 letter from J. Steven Griles, Assistant Secretary of the Interior for Land and Minerals Management, to Chairman Rahall, he proposes the Department allow a finding of a valuable deposit if there was:

> an outcrop of the Parachute Creek Member of the Green River Formation ... within the confines of an oil shale claim in the Piceance or Uintah basins. Lacking such outcrop, an exposure of a tongue of marlstone, yielding not less than 3 gallons of shale oil per ton of rock upon destructive distillation, that can be reasonably used to infer the existence of the Parachute Creek Member at shallow depth (less than or equal to 300 feet) within the confines of the claim will satisfy the test of discovery.

Interior's suggestion is flawed for two reasons. First, instead of requiring a physical finding of a valuable mineral deposit, Interior will settle for the mere inference of such a finding. Tolerating a mere inference only exacerbates the problem of questionable claims which still lingers from the 1920s.

Second, Interior is willing to base its inference of a valuable mineral deposit on an extraordinarily low threshold. A claimant need find only 3 gallons of oil shale in each ton of rock, a surprisingly low number given: (1) no one has ever seriously suggested using oil shale containing less than 25 gallons of shale oil per ton (the average concentration of high quality oil shale is about 30 - 70 gallons per ton); and (2) many geologists consider rock containing less than 3 gallons of shale oil per ton to be indistinguishable from average shale or limestone in the earth's crust.

Interior's weak standards certainly do nothing to protect federal lands from speculative attempts to obtain federal property under the guise of oil shale mining.

(3). Failure to require substantial compliance with annual assessment work.

When oil shale was reclassified as a leasable mineral in the 1920 Mineral Leasing Act, patentable claims were grandfathered by Section 37 of that act if they were "thereafter maintained in compliance with the laws under which initiated." The law allowing a patent, the 1872 hardrock mining law, requires:

> not less than $100 worth of labor shall be performed or improvements made during each year.... [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation ... provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location...."

Despite a 1970 Supreme Court case demanding "substantial compliance" with this assessment work requirement, and despite admissions that prior to 1970 annual assessment work was often ignored for years at a time, many claims are now eligible for patent. While it is fair to say the legal backdrop to the annual assessment requirement is less than straightforward, there is serious question as to whether judicial and administrative vacillations should sanctify claims admittedly abandoned before being hastily retrieved.

B. CONGRESS MUST ACT BECAUSE THE INTERIOR DEPARTMENT HAS LOST ITS STAMINA IN DEFENDING PUBLIC LANDS FROM OIL SHALE CLAIMANTS.

The second reason for Congress to intervene is because the Department of Interior has failed to be a strong and persistent advocate to ensure public lands are not improperly disposed of. While the Supreme Court has opened the door to a complete resolution of the oil shale conundrum, the Interior Department has failed to walk through it. Even where the Department was willing to take the first steps toward protecting public resources, it lacks the resolve and stamina to test fully and assert the public interest. The Department says it is constrained by invisible precedent, which only they, with some assistance from the Claimants, seem to find.

For example, in Hickel v. Oil Shale Corporation, 400 U.S. 48, 58 (1970), the Supreme Court called for a thorough reexamination of many of the issues haunting oil shale claims:

> [O]n remand all issues relevant to the current validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent they are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be open, including inadequate assessment work, abandonment, fraud and the like....

Yet even with this invitation, the Administration seems anxious to bind itself with nonexistent precedent. For example, in a 2 October 1987 letter from Assistant Secretary Griles to Chairman Rahall of the House Subcommittee on Mining and Natural Resources, the Interior Department insists that if an oil shale claimant abandons his claim by failing to undertake any annual assessment work for many years, so long as the claimant resumes assessment work prior to the initiation of a Government contest challenging the claim, that resumption is an absolute defense against the government's challenge of abandonment.

While there may be disagreement over how this legal issue would be decided ultimately, the Administration is unwilling even to test the public's right to keep its lands, even in the face of Hickel's broad opportunity.

Similarly, the Administration relies on its perceived obligations to "equity" in refusing to inquire into a claimant's assessment work performance prior to 1972, when the Department published regulations (43 C.F.R. Section 3851.3[a]) alerting all mining claimants that their claims were subject to cancellation for failure to comply substantially with obligations to perform annual assessment work. (See Section 3(a) of the 13, July 1987, letter from Assistant Secretary Griles to Chairman Rahall.)

The Department readily constrains itself in the name of equity, but seems willing to ignore the Claimants' questionable practices which may disqualify them from receiving the equity Interior is so willing to give. (See the Appendix to Hickel v. Oil Shale Corporation, 400 U.S. at 59 for some enlightenment as to the maneuvers some claimants have used to acquire lands of potential immense value).

C. CONGRESS MUST ACT BECAUSE THE COURT DECISIONS HAVE ACCORDED OIL SHALE CLAIMANTS UNIQUE AND UNWARRANTED PUBLIC BENEFITS.

As a result of a long line of judicial decisions, culminating in the Colorado District Court's opinion of May 1, 1985, federally owned public lands, which may or may not contain valuable deposits of oil shale, are susceptible to acquisition by private developers. These developers may have no interest in mining oil shale -- their principle motivation might well be to engage in land speculation.

Since the first Supreme Court case dealing with oil shale lands was decided in 1929, through the most recent Federal District Court decision in 1985, the Courts have liberalized greatly the requirements for obtaining a patent to oil shale lands on which some claim was located prior to 1920. As a result, there is little impediment to the passage of these lands into private hands, even though oil shale has never been extracted from them, the Claimants have done only miniscule work on them to discover whether oil shale actually exists in commercial quantities, and the prospects of mining oil shale on them is scant, at best.

Over the years the law relating to patenting oil shale lands has been turned on its head -- discovery requirements have been minimized, annual assessment obligations have been forgiven, and the need to locate a deposit that would be profitable to extract under today's circumstances has been abandoned completely. This dramatic mutation of the mining law cannot be laid solely at the feet of the Interior Department, the Courts, or the Claimants. There is some evidence that Congress acquiesced in this erosion of the normal mining requirements.

Suffice to say that these pre-1920 oil shale claims have achieved a status unique under the mining laws. There need be no demonstration they can be commercially mined. No demonstration that regular assessment work has been done on the claim since its pre-1920 location is needed. Finally, there is serious question about the degree of investigation that will be undertaken to determine if claims were located validly, or if the entire claim is founded on a paper fraud.

There is little relief in sight. While the Colorado District Court's opinion in TOSCO v. Hodel was vacated recently pursuant to the August 1986 Settlement agreement, the vacatur is not a sure-fire remedy for three reasons.

First, vacated opinions often are cited with approval by subsequent courts and agencies. One need only examine the dozens of times in which courts and agencies have cited an earlier decision of the same Federal District Court judge, even though the decision cited had already been vacated by the Tenth Circuit. In short, vacatur does not deter later decisionmakers from relying on the supposedly obsolete opinion.

Second, even though the opinion is vacated, there is no reason to believe new oil shale cases will not come before the same District Court judge, and no reason to expect he would rule differently given similar facts.

Finally, we cannot know to what extent the Interior Department will simply capitulate to future applications for an oil shale patent, and thereby preclude the matter from ever coming to the courts. Interior may be so shell-shocked by the current state of oil shale law they will not expend more legal troops in a battle to retain these remaining lands in federal ownership.

This Committee need not concern itself so much with the legal causes and procedures as with the legal result. That result puts pre-1920 oil shale claims in a unique category and enormously facilities their privatization, the loss of federal control, and the abandonment of multiple use on those lands. All of this can happen even though the lands may never be mined for oil shale. That result cries out for a Congressional cure.

D. CONGRESS MUST ACT BECAUSE OF THE EXTENSIVE GEOGRAPHIC PROBLEM.

Congress must intervene because of the geographic magnitude of the problem. I have with me maps of Wyoming and Colorado which show the extent of the public lands at jeopardy from oil shale privatization. All told some 240,000 acres of federal lands in Colorado, Wyoming, and Utah have claims on them. 100,000 acres remain at risk in Colorado, and patent applications have been sought already on about 11,000 of those remaining acres. The cross-hatches on this

Geological Survey Map of Colorado indicate the extensive lands involved, and includes the 82,000 acres which have already gone to patent.

In Wyoming, no lands were patented under the Settlement Agreement, and no applications for patents have been filed. Yet many lands are at risk from oil shale privatization. On this map of Wyoming, the red-brown areas show lands still subject to oil shale claims. Note that these 54,000 acres include lands in Fossil Butte National Monument, as well as lakeshore property along the Fontenelle Reservoir.

What is clear from these maps is that oil shale poses a large problem in Colorado and Wyoming, not to mention Utah, where 16,000 acres are at risk.

E. CONGRESS MUST ACT BECAUSE PATENTING THE OIL SHALE LANDS WILL IMPAIR MULTIPLE USE VALUES OF THE LAND.

Attached to my testimony are three documents elaborating on several risks to other natural resources posed by the patenting of oil shale lands: (1) An affidavit produced for the 10th Circuit Court of Appeals by John Ellenberger, a senior wildlife biologist in the Colorado Division of Wildlife (Exhibit 1); (2) Excerpts from a complaint filed by the State of Colorado in 1986 seeking to block the transfer of the 82,000 acres covered in the settlement agreement (Exhibit 2); and (3) a letter from Steve Blomeke, the Executive Director of the Colorado Wildlife Federation, a state conservation-education organization (Exhibit 3).

Each of these documents points out that patenting the oil shale claims risks other important resources now used by the public. For example, at Paragraph 4 of wildlife biologist John Ellenberger's affidavit he notes the White River Mule Deer herd uses the oil shale claims lands, and it is the largest herd of that species anywhere in North America. These lands are also used by elk, mountain lions, black bear, whooping cranes and bald eagles. Ellenberger states:

> additional development of this area in the form of construction work and oil shale development will have substantial detrimental impact on the area's wildlife, resulting in considerable loss of elk and deer due to loss of habitat.

However, even if oil shale development is never undertaken on patented oil shale lands, transferring them to private ownership precludes public management of the land and may impair current uses of this federal domain. Wildlife biologist Ellenberger puts it this way:

> Issuance of patents on these lands may diminish or extinguish the Division of Wildlife's ability to manage the herds and maintain a supervisory role over the other animal species which inhabit the subject areas if restrictions are placed [on] Division access to the lands.
>
> ...
>
> Large portions of land in the area are already privately owned. Many of these private portions control access to much of the public lands, sometimes making access to the public lands difficult. If another 80,000 acres were to go private, access to large parts of the public land would become impossible... If access is further restricted in the basin management may become impossible. Ellenberger at Paras 9-10.

The State of Colorado's complaint reinforces Ellenberger's concerns. At Para. 38 of Exhibit 2 Colorado states:

> The subject lands include critical wildlife habitat for elk, and summer and winter ranges for both elk and mule deer.... The impacts on these wildlife resources are mitigated through prohibition of open pit mining in certain areas, the establishment of habitat carrying capacities, the establishment of utility corridors, and the establishment of seasonal and permanent offroad vehicle road closures. The patenting of lands ... will reduce recreational opportunities, and will result in loss of revenues from the sale of hunting licenses.

The State also fears that "[t]he patenting of lands ... will threaten these rare and sensitive plant populations." Ex. 2 at Para. 39.

I believe there is little doubt that when the public loses control of federal lands it loses many benefits, without any countervailing assurance of oil production.

F. CONGRESS MUST ACT LEGISLATIVELY BECAUSE BOTH THE ADMINISTRATION AND THE CLAIMANTS WILL OPPOSE CONGRESS' INTERVENTION IN THE JUDICIAL RESOLUTION OF THESE LANDS.

A final reason why Congressional legislation is needed is because it may be the only mechanism available to members of Congress. To date, the public and Congress have been locked out of adjudication of these issues, and if the Claimants and the government had their way, the lock-out would be permanent.

For proof we need look no further than the recent Settlement Agreement between the Interior Department and the Claimants. Five members of Congress, the State of Colorado, and a local and national conservation organization faced two roadblocks in their attempt to participate in the appellate examination of the propriety of the Settlement Agreement.

The first roadblock placed by Interior and the Claimants was a finely crafted Settlement Agreement which precluded further judicial review and blocked intervention in the case. Because the Settlement Agreement purportedly disposed of all the issues in the litigation, the Claimants and Government argued there was no longer a case or controversy and therefore no opportunity for appellate judicial review, or for intervention by interested Congressmen or public interest groups. Indeed, this argument persuaded the Tenth Circuit to deny intervention in the case.

I cannot read the minds of the lawyers for Interior and the Claimants, and therefore cannot represent that the Settlement was designed purposefully to preclude participation by states, Congress, and the public. Nevertheless, the Settlement had that effect and I would be surprised if such a vehicle is not considered seriously in the future by those same parties as a means of assuring unwanted public interest representatives, states, and members of Congress are not permitted to meddle in whatever deal is struck between future Claimants and the Interior Department.

One reason I am persuaded that the Claimants and the Government will try to block Congressional, state, and public interest participation in future judicial action is because of the second roadblock they tried to place in the path of those seeking intervention in the Settlement. Both Claimants and the Government argued that neither Congress nor the public interest groups had standing to participate in litigation over oil shale lands. They asserted that neither individual Congressman nor members of the public who used the federal lands could claim any injury sufficient to their interests to allow them into federal court.

For example, in their brief before the Tenth Circuit, the Government argued:

> The only interest of the congressional applicants relate to their interests, as committee members, in overseeing public lands and resources so that they will be managed to their satisfaction. But such interests are furthered through the political process, not the judicial process..... A congressman's interest in having enacted laws administered to his satisfaction is akin to any citizen's generalized grievance about the conduct of government and, accordingly, cannot support standing...

Similarly, the Claimants asserted in their Tenth Circuit brief that:

> It is not material that Movants include four of the 535 Members of Congress. They have no more standing to intervene in actions such as these than any citizen would have, and according them any special role would raise separation-of-powers issues. They assert that because of the settlement they will no longer have a voice in

> overseeing the patented lands and establishing policy for their use. The courts and commentators agree that Circumstances such as those presented here do not establish standing for individual members of Congress.
>
> The Congressional movants seek to establish their standing to intervene on their status as members of Congress. '[T]he concept of injury ... has meaning with respect to congressional [parties] only if it entails injury to the role of legislator as distinct from the role of citizen or private victim.' ... The Congressional movants have shown no such injury.
>
> ...While the Congressional movants in this case are displeased with the settlement, it is clear that Senators Armstrong and McClure and Representative Strang are pleased with it. The Congressional movants are not even in the position of challenging alleged illegal executive action. At most they challenge a change in the interpretation of a statute's terms by the governmental department charged with enforcing it. The dispute of the congressional movants is either with other members of Congress or with the executive branch. In either case, prudential separation of powers concerns dictate that they not be allowed to intervene.

I believe this outrageous proposition is the harbinger of future frustration if Congress does not enact legislation to deal with the oil shale giveaway. The courts still may be available to test the propriety of patenting oil shale lands, but the Claimants and the Government will seek to cut off that review if Congressmen or public interest representatives seek to expose the patents to the light of day. In short, the current legislative and judicial scheme, which already accords oil shale a unique and substantial benefit, will be used to insure that Congressmen, the states and the public are barred from challenging whatever sweetheart deal the government and the Claimants may concoct in the future.

THE CONSTITUTIONALITY OF H.R. 1039.

One remedy actively being debated to address the problems of the oil shale claims is H.R. 1039. Some have questioned the constitutionality of this approach, and I want to take just a moment to address why I believe that bill's provisions easily pass constitutional muster.

A. THE CONSTITUTIONALITY OF LIMITING THE AVAILABILITY OF PATENTS.

The fifth amendment to the Constitution prohibits the taking of private property for public purposes without just compensation. Opponents of H.R. 1039 can be expected to argue that denying a mining claimant the right to patent his claim constitutes a taking within the meaning of the fifth amendment's prohibition. This argument has little merit. Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

There is no vested right to a grant of title to federal lands pursuant to the mining law until the claimant meets all of the requirements for issuance of patent. Id.; Alaska Miners v. Andrus, 662 F.2d 577 (9th Cir. 1981). These requirements include all the criteria for a valid claim, i.e. proper location and recordation, discovery of a valuable mineral deposit, and completion of annual assessment work. In addition, the claimant must have applied for a patent and paid the requisite fee.

None of the oil shale claimants allegedly affected by the proposed prohibition on the issuance of new mining patents have complied with these patenting requirements. Since no patent right has been vested, no taking of the claimants' property is worked by H.R. 1039. Alaska Miners v. Andrus, 662 F.2d 577; Freese v. United States, 639 F.2d 754 (Ct. Cl.), cert. denied, 454 U.S. 837 (1981).

With repsect to mining patents, Congress repeatedly has been willing to preclude their issuance in legislation designating federal lands for special uses. See, e.g., Sawtooth National Recreation Area Act of 1972, 16 U.S.C. Section 460aa *et seq.* (1982), Wilderness Preservation System Act, 16 U.S.C. Section 1131 *et seq.*, Steese National Conservation Area and White Mountain National Recreation Area Act of 1980, 16 U.S.C. Section 460mm *et seq.*, Oregon Cascades Recreation Area Act of 1984, 16 U.S.C. Section 460oo *et seq.*

Section 460aa-11 of the Sawtooth National Recreation Area Act provides that:

> [p]atents shall not hereafter be issued for locations and claims heretofore made in the recreation area under the mining laws of the United States.

The constitutionality of this provision was upheld specifically by the United States Court of Claims in *Freese v. United States*, 639 F.2d 754 (Ct. Cl. 1981). The plaintiff in the *Freese* case was the holder of five unpatented mining claims located on federal lands within the Sawtooth National Recreation Area. He argued that Congress' action terminating the ability of existing claimholders to proceed to patent claims located within the recreation area constituted an unconstitutional taking by inverse condemnation. The court disagreed, noting that while the plaintiff's opportunities had been somewhat narrowed, plaintiff had not suffered a deprivation of private property within the meaning of the fifth amendment:

> The case before us thus ultimately reduces to the question whether plaintiff has suffered an unconstitutional divestment solely be virtue of the fact he no longer has the option to apply for patents upon his claims. Common sense dictates a negative response. At best, plaintiff has suffered a denial of the opportunity to obtain greater property than that which he owned upon the effective date of the Sawtooth Act. This cannot fairly be deemed the divestment of a property interest, save by the most overt bootstrapping.

The Wilderness statute as well as the other statutes listed above place similar limitations on the ability of present claimholders to obtain patent to the land upon which their claims are located. H.R. 1039 would do no more.

There are several problems with the constitutional analysis provided in the Minority Views of the Committee's Report on H.R. 1039 (Report 100-43). These problems stem from the fact the minority confuses the possessory interest in land which attends a valid mining claim with the grant of title to land represented by a mining patent. H.R. 1039 eliminates only the latter.

The proposed legislation does not "change the vested rights of the oil shale claimant" as the minority report contends. The rights of the claimant in a mining claim are nothing more than the exclusive possession of the land for exploration and extraction. Black v. Elkhorn Mining Co, 163 U.S. 445, 450 (1896). The proposed legislation does not disturb this possessory interest of the oil shale claimant in the mine site. The claimant can continue to mine his claim and has ownership of any minerals extracted.

The cases cited by the minority do not support their assertions of unconstitutionality. The Alaska court's interpretation of the Alaska Native Settlement Claims Act merely asserts the possessory right of a mining claimant to exclude competing claimants from his mine site. The court also held there is no inalienable right to apply for and receive a mining patent. As the minority report indicates, the court recognized explicitly the authority of Congress to limit the availability of mining patents. Alaska Miners v. Andrus, 662 F.2d 577.

The citation to the Regional Rail Reorganization Act Cases, 419 U.S. 102, 126-27 (1974), is equally unconvincing. The case does not hold, as the minority suggests, that the denial of the expectation of receiving a property right in the future constitutes an unconstitutional taking. Section

304 of the Regional Rail Reorganization Act, 45 U.S.C. 744, compelled the continued operation of a railway at a loss until such time as a reorganization plan was implemented. The government defendants admitted there was no assurance under the Act that such a reorganization plan would be implemented. The Court, therefore, concluded that the continued compelled erosion of railway assets might at some point constitute an impermissible taking of property. That point, according to the Court, does not occur until the railway "has suffered losses unreasonable even in the light of the public interest in continued rail service pending reorganization." Regional Rail, 419 U.S. 123-24; see also Keystone Bituminous Coal Ass'n v. DeBenedictis, ____ U.S. , No. 85-1092 (March 9, 1987). The Court found no taking had occurred with respect to the Penn Central properties despite the existence of huge financial losses.

Lastly, the minority cites Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984). However, the legislation challenged in Skaw is easily distinguishable from H.R. 1039. At issue in Skaw was Section 708 of the National Parks and Recreation Act of 1978, 16 U.S.C. 1274(a)(23). Section 708 of the National Parks and Recreation Act of 1978, unlike H.R. 1039, actually prohibited some forms of mining:

> [d]redge or placer mining shall be prohibited within the banks or beds of the main stem of the Saint Joe and its tributary streams in their entirety above the confluence of the main stem with the North Fork of the river.****
>
> For purposes of this river, there are authorized to be appropriated not more than $1,000,000 for the acquisition of lands or interest in lands. Id.

The plaintiffs in Skaw were holders of unpatented mining claims in the vicinity of the upper St. Joe River who sought compensation for a taking under Section 708 on the ground they had been denied all economical use of their claims. Oil shale claim holders can make no such assertion with respect to H.R. 1039 since the proposed legislation does not prohibit the production of oil shale from their claims.

B. THE CONSTITUTIONALITY OF INCREASING THE AMOUNT OF ASSESSMENT WORK OR REQUIRING RECLAMATION.

Even with respect to vested property rights, Congress generally has the power to impose new regulatory constraints on the way those rights are used, or to condition their continued retention on the performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, Congress acts within its powers.

See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), Keystone Bituminous Coal 107 S.Ct. 1232 (1987).

The power to qualify existing property rights is particularly broad with respect to mining claims. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963), the United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. See, e.g., Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 413 (1983). Moreover, the property right held by a mining claimant is only the right to a flow of income from production of the claim. United States v. Locke, 105 S.Ct. 1785, 1798 (1985). Such economic rights repeatedly have been held to be subject to the government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burden of economic life. See, e.g., National Passenger Railroad Corp. v. Atchison, T., & S.F.R. Co., 105 S.Ct. ______ (1985); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1.

In United States v. Locke, 105 S.Ct. 1785, the Supreme Court upheld the validity of the recording provisions of the Federal Land Policy and Management Act, 43 U.S.C. Section 1744(a) (1982) stating that:

> ...there can be no doubt that Congress could condition initial receipt of an unpatented mining claim upon an agreement to perform annual assessment work and make annual filings. That this requirement was applied to claims already located by the time FLPMA was enacted and thus applies to vested claims does not alter the analysis, for any retroactive application of FLPMA is supported by a legitimate legislative purpose furthered by rational means. The purposes of applying FLPMA's filing provisions to claims located before the Act was passed - to rid federal lands of stale mining claims and to provide for centralized collection by federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims - are clearly legitimate. 105 S.Ct. 1798.

Increases in the annual work assessment and reclamation requirements can be justified similarly as actions to achieve legitimate legislative ends, i.e. the production of shale oil in an environmentally sound manner.

CONCLUSION.

It has been more than sixty years since Congress passed the Mineral Leasing Act and asserted its desire to retain oil shale lands in federal ownership. Congress' willingness to grandfather certain claims in that Act has been twisted severely in the intervening years. Thousands and thousands of acres have been patented without a drop of commerical shale oil having been produced.

The complexity and momentum of the existing misguided system compels Congressional action, before the public and this nation lose another 82,000 acres to private parties who may never produce a drop of commercial oil.

Thank you for your attention.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 85-1968, 85-2205, 86-1082, 86-1083
86-1090, 86-1092 to 86-1097

TOSCO CORPORATION, et al.,
Plaintiffs-Appellees,

v.

DONALD P. HODEL, in his official capacity as Secretary of the Interior,

Defendant-Appellant.

AFFIDAVIT OF JOHN ELLENBERGER

City of Grand Junction)
State of Colorado)

I, John Ellenberger, being first duly sworn, state as follows:

1. I am a citizen of the United States currently residing at, 2903 Violet Pl., Grand Junction, 81506, in Mesa County, where I have lived for the past 10 years.

2. I am a senior wildlife biologist with the Colorado State Division of Wildlife and have worked in that capacity for

— EXHIBIT 1

6 years. I hold BS in wildlife biology from Colorado State University.

3. In my capacity as a senior wildlife biologist for the Colorado State Division of Wildlife, over the last 5 years I have conducted numerous wildlife surveys including ground and air censusing of 80,000 acres of lands which I am informed the Department of Interior intends to issue patents for in this litigation, which are identified as the areas with red diagonals drawn through them on the map attach as Exhibit 1 to the Federations' Motion for Intervention and Preliminary Injunction.

4. The primary animals using the land in question are the Mule deer and Elk. The White River Mule Deer herd is the largest herd of that species anywhere in the North America and uses portions of the land for summer and winter grazing and migration routes relying on the lands' vegetation for food and shelter. The scattered Elk herds are growing in population and use the same resources as the Mule deer although the spruce and aspen groves interspersed throughout the territory provide essential shelter and escape cover and are therefore critical to the viability of the elk population. Portions of the specific area in question the Division of Wildlife has declared critical habitat (ie. fawning and calving areas). There is also a substantial population of Mountain Lions inhabiting the area as well as sizeable populations of Black Bear, Blue Grouse, and

Sage Grouse. Many other animals inhabit the lands in lesser numbers and several bird species migrate through region, including the Whooping Crane and the Bald Eagle. The bald eagle uses lands in the area for foraging in the winter, particularily feeding on deer carcasses.

5. To date there has been little development of the lands in question or of surrounding lands. By far the dominant use of these lands has been for sheep and cattle grazing, which is usually compatible with the existing wildlife use of the lands.

6. The development that has taken place in the area consists of Exxon/Colony Development Parachute Creek, C-b oil shale tract and Union Oil Parachute Creek Oil shale. It has had a severe local impact on deer and elk destroying food and shelter sources and introducing humans and machinery which the deer and elk avoid. This development has also brought increased vehicle traffic and roads, thereby increasing animal deaths due to collisions with vehicle.

7. It is my opinion that additional development of this area in the form of construction work and oil shale development will have a substantial detrimental impact on the area's wildlife, resulting in considerable loss of elk and deer due to loss of habitat.

8. The Division of Wildlife takes an active role in managing the Mule Deer Herd and Elk herds in the area. Our management activities include census counts, classification counts, check stations, recommendations for harvest quotas, and require that Division employees and hunters have access across the lands to reach the wildlife herds, in part to promote the hunting of the deer and elk in order to maintain an enviromentally sound population.

9. Issuance of patents on these lands may diminish or extinguish the Division of Wildlife's ability to manage the herds and maintain a supervisory role over the other animal species which inhabit the subject areas if restrictions are placed on public or Division access to the lands.

10. While development may occur even if the lands remained in public ownership, my experience is that if the lands are publicly owned the Division has been able to insure that development is limited or mitigated to lessen impacts on the wildlife and its habitat.

Large portions of land in the area are already privately owned. Many of these private portions control access to much of the public lands, sometimes making acccess to the public lands difficult. If another 80,000 acres were to go private, access to large parts of the public land would become impossible. Hunting is the most effective tool that the Division has to manage big game populations. Under current conditions it is hard to obtain an adequate harvest when populations are at high levels. If access is further restricted in the basin management may become impossible.

Date: 2 Oct 1986

John H. Ellenberger
NAME

Subscribed and Sworn to Before Me This 2nd Day of October 1986.

My Commission Expires: 8-24-89

Jane Findley
Notary Public

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD D. LAMM, Governor State of Colorado State Capitol Building Denver, Colorado 80203 (303) 866-2471, DAVID GETCHES, Executive Director Colorado Department of Natural Resources 1313 Sherman Street, Room 718 Denver, Colorado 80203, (303) 866-3311, and COLORADO DEPARTMENT OF NATURAL RESOURCES 1313 Sherman Street Room 718 (303) 866-3311, Plaintiffs, v. DONALD P. HODEL, Secretary of the Interior United States Department of the Interior 18th and C Streets, N.W. Washington, D.C. 80240 (202) 343-1100, ROBERT J. BURFORD, Director Bureau of Land Management United States Department of the Interior 18th and C Streets, N.W. Washington, D.C. 20240 (202) 343-1100,	Civil Action No. 86-3364

EXHIBIT 2

)
UNITED STATES DEPARTMENT OF)
THE INTERIOR)
18th and C Streets, N.W.)
Washington, D.C. 20240)
(202) 343-1100,)
)
and)
)
BUREAU OF LAND MANAGEMENT)
United States Department)
of the Interior)
18th and C Streets, N.W.)
Washington, D.C. 20240)
(202) 343-1100,)
)
Defendants.)
)
)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the legal authority of the Department of Interior to have entered into a certain agreement entitled "Agreement to Settle Pending Litigation Between the United States and the Owners of Certain Oil Shale Mining Claims in Colorado" (hereinafter "Oil Shale Agreement"). The Oil Shale Agreement was executed on August 4, 1986, by and between the Department of Interior (hereinafter "Interior") and the Depart-

Natural Areas Program, one of the goals of which is to identify, locate and protect rare and sensitive plants. Colo. Rev. Stat. sec. 36-10-104 (1986 Supp.). In order to assure compliance with federal and state environmental laws, the Department of Natural Resources reviews and comments upon environmental assessments, environmental impact statements, management framework plans, resource management plans, and the like, which are published pursuant to FLPMA and NEPA. Colo. Rev. Stat. sec. 24-33-103 (1982).

11. Plaintiff Getches is the Executive Director of the Department of Natural Resources. He is a member of the Energy Impact Assistance Advisory Committee which reviews and makes recommendations concerning the existing and potential impact of the development, processing, or energy conversion of mineral and fuel resources on various areas of the state. Colo. Rev. Stat. sec. 34-63-102 (1984). Under the same set of state statutes which created this Committee, the Mineral Leasing Fund was established. Into this fund are deposited the state's share of sales, bonuses, royalties and rents from federal lands within the state as provided by the Mineral Lands Leasing Act of 1920. Colo. Rev. Stat. sec. 34-63-101 (1984). The fund was created for use by state agencies, public schools, and political subdivisions of the state to aid in planning, construction and maintenance of public facilities, and for public services. Colo. Rev. Stat. sec. 34-63-102 (1984). Ten percent of the moneys in the Mineral Leas-

ing Fund are to be paid into the Colorado Water Conservation Board Construction Fund. Colo. Rev. Stat. sec. 34-63-102(4) (1984 Supp.). Plaintiff Getches is a voting member ex-officio of the Colorado Water Conservation Board. Colo. Rev. Stat. sec. 37-60-104 (1986 Supp.).

12. The plaintiffs and the citizens of the State of Colorado, whose interests the plaintiffs represent pursuant to state law, are suffering and will continue to suffer injury in fact as a result of the challenged actions. The subject oil shale claims cover 82,000 acres of land which are used and enjoyed by virtue of their wildlife resources, rare and sensitive plants and areas of scenic beauty. The use and enjoyment of these resources will be irreparably injured if the lands in question pass into private ownership without compliance with applicable federal laws. In addition, the plaintiffs and the citizens of the State of Colorado will be deprived of significant sources of revenues from federal mineral royalties to which they are entitled under federal law. Further, the plaintiffs and the citizens of the State of Colorado have suffered, and will continue to suffer, injury since they have been and continue to be, denied information concerning the impacts of, and alternatives to, the defendants' actions and have been, and continue to be, denied the opportunity to participate in the defendants' decision to execute the Oil Shale Agreement.

Shale Agreement will remove them from federal ownership and will thwart the implementation of these measures which have been deemed necessary to mitigate the environmental consequences of developing oil shale.

38. The subject lands include critical wildlife habitat for elk, and summer and winter ranges for both elk and mule deer. Under the current RMP/EIS for the Piceance Basin Planning Area, the need for wildlife management, and the recreational values and revenue potentials of hunting are recognized. The impacts on these wildlife resources are mitigated through prohibition of open pit mining in certain areas, the establishment of habitat carrying capacities, the establishment of utility corridors, and the establishment of seasonal and permanent offroad vehicle road closures. The patenting of lands under the Oil Shale Agreement will preclude proper wildlife management, will reduce recreational opportunities, and will result in loss of revenues from the sale of hunting licenses.

39. Under the current RMP/EIS for the Piceance Basin Planning Area, rare and sensitive plant populations will be protected from disturbance, inter alia, through the incorporation of avoidance and no surface disturbance stipulations for all potential surface disturbing activities and impacts and through seasonal and permanent offroad vehicle road closures. The patenting of lands under the Oil Shale Agreement will threaten

these rare and sensitive plant populations.

40. The Oil Shale Agreement covers lands which are valued for their scenic beauty and unique geologic features. Under the RMP/EIS for the Piceance Basin Planning Area, the impacts on these areas are mitigated by restricting development and by designating utility corridors. The patenting of the lands covered by the Oil Shale Agreement will transfer these lands out of federal ownership and will threaten their scenic quality.

41. The above-described changes, which will result from the execution of the Oil Shale Agreement, mandate that the defendants either revise or amend the existing RMP and supplement the EIS for the Piceance Basin Planning Area.

42. A revised resource management plan must comply with all the regulations for initial preparation and approval of the original resource management plan which require public notice, opportunity for public comment, consultation and coordination with public agencies and officials, including the governor of the state in which the property is located, and the preparation of an EIS. 43 C.F.R. part 1600. Similarly, an amended RMP must include an environmental assessment or an EIS, public involvement, interagency coordination and consistency determinations. 43 C.F.R. 1610.5-5. Likewise, a supplemental EIS must be prepared in the same fashion as a final EIS which mandates, inter alia, public involvement and interagency coordination. 40 C.F.R.

Colorado Wildlife Federation

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Executive Director
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Office Manager
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Public Affairs

October 14, 1987

Senator John Melcher
United States Senate
Washington, D.C.

RE: Hearing by Sumcommittee on Mineral Resources and Production.

Dear Senator Melcher:

The Colorado Wildlife Federation is pleased to comment on your hearing regarding certain oil shale claims in our state as well as Utah and Wyoming.

The Colorado Wildlife Federation is an organization of over 16,400 individual members many of whom regularly use public lands in Colorado for various forms of outdoor recreation including hunting, fishing, hiking, camping and wildlife observation.

The recent transfer of certain oil shale claims to private interests is most disturbing to our organization. Once these lands become private, there will be little, if any, opportunity for public use. Recreation is a growing part of Colorado's economy and access to public lands is vital to the economic well-being of our state. Allowing the giveaway of these oil shale claims is not in the best interests of our memebership or the federal government.

It is our understanding that your sumbcommitttee is considerir H.R. 1039 passed by the House as a remedy to further disposal of public oil shale lands. We support H.R. 1039 and urge that you consider strengthening what the House has already accomplished.

Colorado like Montana and other Western States has some of the last places in our nation that have wide open spaces under public ownership. The federal government must be allowed to manage those lands for both present and future generations of Americans. Oil shale claims must not be converted to private speculation. There are too few opportunities left to allow this to happen.

Thank you for considerting our views.

Sincerely,

Steve Blomeke
Executive Director

EXHIBIT 3

1560 Broadway, Rm 895 Denver, Colorado 80202 (303) 830-2557

Working for the Nature of Tomorrow™
NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

Statement of

Karl Gawell
Legislative Representative
Public Lands and Energy Division
National Wildlife Federation

regarding

The Processing of
Oil Shale Mining Claims and Patents
by the Department of the Interior
under the
Mining Law of 1872

and

H.R. 1039

before the

Subcommittee on
Mineral Resources Development and Production
of the
Senate Committee on Energy and Natural Resources

October 16, 1987

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to present the views of the National Wildlife Federation on H.R. 1039, as passed by the House of Representatives. The National Wildlife Federation, which represents 4.8 million members and supporters who have an interest in the stewardship of public lands and minerals, strongly supports the House's action. We believe that this legislation would resolve the public policy dilemma posed by oil shale mining claims.

Before this Subcommittee today, the Director of the National Wildlife Federation's Rocky Mountain Natural Resources Clinic, Mr. Tom Lustig, has discussed the background of the oil shale controversy. He has explained that judicial and administrative actions will not be likely to resolve the oil shale claims dilemma in a reasonable manner protective of the public's interest in these lands. In addition, Mr. Lustig has reviewed the basis for our belief that action, such as that proposed in H.R. 1039, is fully within the Congress' Constitutional powers.

We have also included for the Subcommittee's record a statement from the Colorado Wildlife Federation expressing the interest of its members, and the public, in retaining these lands in Federal ownership. Finally, we have appended a copy of the affidavit of John Ellenberger, Senior Wildlife Biologist, Division of Wildlife, State of Colorado, discussing the unique wildlife habitat values of the lands encompassed by these oil shale claims.

In the remarks which follow, I will review the major provisions of H.R. 1039 and suggest several alternative approaches which the Subcommittee may wish to consider.

The Oil Shale Claims Controversy

The oil shale claims which are the source of today's controversy are over 50 years old. They were filed for public lands in Colorado, Wyoming and Utah, before oil shale was made a leaseable mineral by the 1920 Mineral Lands Leasing Act. Despite the fact that no commercial shale oil production has occurred on any of these claims for several decades, hundreds of thousands of acres of public lands have been patented into private ownership due to the antiquated terms of the Law.

The disposal of roughly 80,000 acres of public lands in the State of Colorado last year has renewed public interest in these claims. During the 99th Congess, several Members of this Committee -- Senators Melcher, Metzenbaum and Wirth -- joined with the Federation in an attempt to block the actions of the Department of the Interior to convey these lands. However, the settlement agreement did result in the disposal of these lands.

While the decision of the Department of the Interior to dispose of these 80,000 acres of public lands may be beyond recourse, an additional 270,000 acres of public lands in Wyoming, Colorado and Utah may be transferred to other claimants if Congress does not act.[1]

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[1] In total, some 1700 claims are still pending involving 270,000 acres of public lands. Most of these claims are held by large energy related corporations. Some 75 claims are the subject of pending patent applications. These claims involve 11,400 acres of public lands in Colorado. Again, the claimants are dominated by energy related corporations including Exxon, Union Oil of California, Marathon Oil and

The National Wildlife Federation urges this Subcommittee to prevent the disposal of additional public lands to oil shale claimants. There are no legitimate public policy purposes served by transferring another 270,000 acres of public lands to private owners for $2.50 an acre. H.R. 1039 will prevent the disposal of title to these public lands.

The National Wildlife Federation urges this Subcommittee to remove the cloud which has remained over the management of these public lands and resources for the past 70 years. H.R. 1039 ends decades of controversy by requiring claim holders to exchange their claim for a fixed term lease or commence annual expenditures on the claims which represent work towards commercial development. While the exact requirement will be defined by the Secretary of the Interior, the House

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(footnote cont'd)

the TOSCO Corporation.

Report suggests a $5,000 annual work requirement as a minimum obligation.

While the legislation before this Subcommittee today, H.R. 1039, amends the 1920 Mineral Lands Leasing Act, the Subcommittee should recognize this leasing statute is not the root cause of the oil shale controversy. The antiquated provisions of the 1872 Mining Law are the cause of this dilemma.

The Federation recognizes there is a great deal of trepidation about amending the Mining Law. Therefore, we are not asking this Subcommittee to expand any legislation which it reports beyond oil shale claims. However, we do wish to call to its attention the fact there are parallel problems with other minerals under the 1872 Mining Law, and to urge the Subcommittee to consider examining amendments to the 1872 Mining Law in the future.

H.R. 1039

During the consideration of H.R. 1039 in the House Interior Committee, we urged them to support statutory amendments which would:

1) prohibit the future patenting of oil shale and all other mining claims;

2) require the Secretary of the Interior to establish an annual assessment expenditure requirement for oil shale claims which represents diligent efforts towards commercial production of the mineral claimed; and

3) provide the Secretary of the Interior with the explicit authority and obligation to protect the environment and ensure that mined lands are reclaimed.

H.R. 1039, as passed by the House, incorporates these provisions and two other features. First, it establishes a clear series of deadlines for claim holders to indicate their intention to continue holding their claim under the new requirements of the law. Secondly, it allows claim holders to obtain federal leases having a primary term of twenty years.

This first provision is intended, in part, to determine whether any current oil shale claim holders have such limited speculative interest that they do not wish to continue holding and working the claim. The second was included, in part, to provide an option for those claim holders who are interested in developing the shale oil but lack adequate resources to proceed with development at this time.

What follows is a discussion of the major provisions of H.R. 1039 as passed by the House and our suggestions for amendments which this Subcommittee may wish to consider. We wish to note, however, that these suggestions are not intended to be criticisms of the House Bill. We worked closely with Mr. Udall, Mr. Rahall, Mr. Campbell and the other Members of the House Committee on Interior and Insular Affairs in preparing H.R. 1039, and support its provisions fully. It clearly represents a workable solution to the dilemma posed by oil shale claims.

1) Patenting

H.R. 1039 would prohibit the issuance of any future patents for oil shale claims. As discussed in more detail by Mr Lustig, we fully believe this is within the limits of Congress' Constitutional powers. There are no legitimate reasons to allow patenting of these public lands. Holders of valid claims already enjoy the statutory right of "exclusive possession" of the lands embraced by the claim "for the purposes of mining."[2]

---

[2] Proposals under discussion in the 99th Congress faced more serious Constitutional questions, since they could have been viewed as reaching back to overturn past decisions about the validity of the existing oil shale claims. In the proposal here, the validity of the claims held by these corporations and individuals is not in question, only the expectation of future patent is curtailed. The holders of oil shale claims may continue to hold and productively mine their claims provided they continue to meet the other requirements of the law. Moreover, the proposal would allow claim holders the opportunity to obtain a longer term lease. It should be noted that there is no Constitutional prohibition on the taking of private property for public purposes other than the Fifth Amendment requirements of "due process" and "just compensation." With respect to legislation the deliberations of Congress itself can be viewed as providing the claimants with the requisite due process. Further, it is questionable what compensation any claim holder could be due, since in the worst case only the difference in value between an oil shale claim and an oil shale lease would appear relevant.

2) Annual Assessment Work

In addition, H.R. 1039 would impose new requirements for annual assessment work, and condition the existence of the claim on the performance of such future work. While this provision of the House Bill is a major improvement over existing law, which requires little or no annual work, we have two concerns about the provision.

First, H.R. 1039 allows the Secretary to establish the amount of annual work required. This provides the advantage of administrative flexibility, but it also carries the disadvantage of Secretarial discretion. If Congress has the power to impose such reasonable new conditions on claim holders as is necessary to protect the public interest, which we believe it does have, then a variety of statutory requirements which are more clear cut can be molded to address the failure of claim holders to develop their claims.

In particular, we would encourage the Subcommittee to consider more explicit requirements for development of a shale oil production facility. The existing claim holders could be required to produce a mining and reclamation plan for their claims, which would be subject to review and approval by the Secretary within a specified time. After approval of the plan, the claim holder could be held accountable to the annual goals of the mining plan, and ultimately to produce shale oil. We believe that a requirement to be producing between 1,000 and 10,000 barrels per day of shale oil within seven to ten years is reasonable, and in the national interest.[3]

This alternative approach could address one other concern we have about H.R. 1039's annual work requirement, e.g. that it could encourage "$5,000 open pit mines." Claim holders could be restrained from further surface disturbing activities until the mining and reclamation plan was approved by the Secretary. This would reduce the potential for near term damage, and ensure that all future shale oil development occurs under acceptable mitigation and reclamation requirements.

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[3] Estimates of the production capacity of commerical scale projects range from 10,000 barrels per day to 100,000 barrels per day, Oil Shale in the United States 1981, Energy Development Consultants, Inc., September 1980, Table 16, page 44. The Congressional Office of Technology Assessment estimated that construction of an oil shale facility would take between 5 and 7 years, An assessment of Oil Shale Technologies, Congress of the United States, Office of Technology Assessment, June, 1980, pg. 164.

3) Oil Shale Leases

H.R. 1039 allows holders of "valid" oil shale claims to receive a federal lease in lieu of their interest in the claim. While we have reservations about approving oil shale leases for large expanses of public lands, we agree that this provision would resolve the cloud which has remained over the management of these lands for almost a century. The most critical aspect of this provision is that it include a clear deadline by which production of commercial quantities of shale oil must be achieved.

The unresolved question of lease approval is what constitutes a "valid" claim for the purposes of obtaining a lease. We would encourage the Subcommittee to include a more explicit definition of this requirement. In particular, we would encourage the Subcommittee to direct the Secretary to adopt the discovery standard used for all other hard rock minerals, instead of the unique (and more liberal) standard which the Department apparently intends to apply to oil shale claims.

In addition, the Subcommittee may wish to consider whether or not an explicit royalty rate should be included in the legislation, and whether the waiver of the oil shale lease acreage limitation of existing law should be limited to the initial holder of the leases.

4) Reclamation and Environmental Protection

H.R. 1039 includes provisions to ensure the protection of the environment and reclamation of mined lands. We believe that such provisions are essential to any legislation enacted by Congress. H.R. 1039 seeks to resolve the oil shale claims controversy, but in doing so it seeks to encourage the development of existing oil shale claims.

In order to support any development of existing claims, or future leases, we believe that explicit statutory authority for reclamation of mined lands and bonding of mining operations is needed. There should be no question about the authority, or obligation of the Secretary to require bonding, reclamation, and otherwise act to protect the environment.

However, if the Subcommittee adopts the requirement that oil shale claimants submit a mining and reclamation plan which was discussed earlier, a separate provision would be unnecessary. The bonding, reclamation and environmental protection provisions of the House legislation could be incorporated into the mining plan and lease approval process.

5) Deadline For Election To Hold Claim Or Apply For Lease

H.R. 1039 requires all claim holders to make "an election" within 90 days of enactment to either hold the claim or apply for a lease. While we applaud the House's interest in clearing up these claims expeditiously, we would encourage this Subcommittee to consider a slightly different deadline with clearer statutory consequences.[4]

We would suggest that all claim holders be required by a date certain, perhaps June 1, 1988, to file a notice of intent to hold and work their claims. The statute should indicate explicitly that failure to file this notice constitutes conclusive evidence of abandonment of the claim.

This notice should include all administrative and geological information necessary for administration of these public lands, such as all owners of record. Claim holders should be required to maintain these records with the Bureau of Land Management, and notify the Director of the BLM of any changes in the information required within ten (10) days of the change. In the past, administrative errors, such as failure to properly notify all holders of record, has been grounds for the reversal of agency decisions regarding several of these claims. This would help prevent such problems from recurring.

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[4] _See United States v. Locke_, 105 S. Ct. 1785 (1985),

6) Curtailing Future Litigation

One of the major criticisms raised in the Minority Views of the House Report on H.R. 1039 is the potential for any legislation addressing oil shale claims to be litigated extensively. Unlike the minority views, however, we do not believe that H.R. 1039 will cause another 60 years of litigation. We do believe, however, that the Minority's concern over future litigation is an area proper for the Congress to address. To that end, we have several suggestions.

We would suggest the Subcommittee adopt explicit requirements that the legislation be implemented by rulemaking. This would provide all parties the administrative and procedural safeguards inherent in the Administrative Procedure Act. Moreover, the statute should require any challenge to the regulations to be brought in the District Court for the District of Columbia within 90 days of the publication of final regulations.

In this manner, all of the substantive issues regarding the authority of the Congress and the Secretary of the Interior, the definition of key terms such as "discovery," and other important issues will be addressed early on. The rulemaking process will afford all parties input to the decision and ensure that the Secretary reaches his or her decisions based upon the record. Finally, any litigation will be brought in the proper District Court before the Secretary has proceeded to expend substantial time and resources administering this statute.

While this approach cannot prevent litigation, and we would not encourage the Subcommittee to curtail individual rights, it will confine litigation. First, the open rulemaking process may resolve disputes before they reach the Courts. Secondly, any substantive issues remaining after final rules are published will be resolved through the Courts at the outset of the program rather than 30 years later

The Subcommittee may also wish to address the question of administrative review for individual claims. Requiring the Department to establish specific administrative review procedures for individuals wishing to appeal decisions about a particular claim would expedite the process. Rather than relying upon the Federal Courts to review what may be difficult and time-consuming issues of fact, a special administrative appeals process could be more expeditious and ultimately less costly to the federal government. Of course, such administrative review should not preclude appeals to the Federal Courts, but may speed the fact finding aspects which otherwise would require more extensive and expensive de novo Court proceedings.

CONCLUSION:

We hope our comments on H.R. 1039, together with the additional testimony and materials submitted today, will assist this Subcommittee in its deliberations.

We urge this Subcommittee to move quickly to stop this oil shale giveaway, and report legislation to resolve the oil shale claims dilemma. We believe H.R. 1039 protects the public's interest in these lands and represents a fair and just solution to this controversy. We urge this Subcommittee to give it favorable consideration.

Thank you.

Senator WIRTH. Mr. Lustig we greatly appreciate your help in the past, and look forward to getting your help in the future on all of this.

Are there items that you have not covered in your testimony? Let me make sure.

You heard my comments on summarizing my reaction to the Department of the Interior's reading of the decision. Do you have any reaction, you were here at the time of their testimony this morning.

Mr. LUSTIG. I think you hit the nail on the head.

The Hickel opinion opened the door for reexamination. In fact at the very end of the Hickel opinion the court says we throw this open for extensive reexamination and I think Hickel raised many questions about the past practices of the Interior Department and they simply did not take advantage of it. That was my concern about having dropped the ball as far as the annual assessment requirement.

There was an enormous opportunity, the door is there, it was opened, and it is still open. Yet it has not been pursued. Instead they rush to judgement and towards settlement.

Senator WIRTH. The Interior Department has said over and over again ever since this issue arose that they have lost every court decision on oil shale cases. And it just is not true. They said it again this morning.

Mr. LUSTIG. Well Hickel is one of them, and moreover, some of their losses——

Senator WIRTH. They did not lose.

Mr. LUSTIG. Hickel, they did not lose Hickel.

Senator WIRTH. Mr. Savage said——

Mr. LUSTIG. I am sorry, Hickel did not lose.

Senator WIRTH. They have said over and over again, the Interior Department always comes up here and parrots the same line that says well we have lost every court decision so therefore we have to go ahead with a settlement like TOSCO. Well it is not true that they have lost every decision. Mr. Savage suggested that this morning, I think the record is very clear on that.

Mr. LUSTIG. And Senator, even in some of the cases where they have lost, they have lost on very small grounds, and there are still lots of opportunities to pursue.

Senator WIRTH. Thank you both very much for being here. We appreciate your help and hope that you realize as everybody does that the hearing record will be kept open for 2 weeks for the submission of additional written materials.

Senators Garn and Armstrong both have statements which will be included in the record, and we may have written questions for the witnesses, particularly those from the Department of the Interior this morning. We will be submitting questions for them and the record will be left open for those answers.

Gentlemen, we thank you very much for being here.

Mr. LUSTIG. Thank you, Senator.

[Whereupon, at 12:35 p.m., the hearing adjourned]

APPENDIXES

APPENDIX I

Responses to Additional Committee Questions

March 3, 1849

United States Department of the Interior
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 30 1987

Honorable John Melcher
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In response to your October 20, 1987, letter we enclose herewith answers to the additional questions from Members of the Subcommittee on Mineral Resources Development and Production and the separate set of questions from Senator Wallop, all relating to the October 16, 1987, oversight hearing on the processing of oil shale mining claims and patents by the Department of the Interior under the Mining Law of 1872.

We trust you will find the information helpful. If you have any additional questions, do not hesitate to contact us.

Sincerely,

James E. Cason

James E. Cason
Deputy Assistant Secretary
Land and Minerals Management

Enclosures

QUESTIONS FROM MEMBERS OF THE SUBCOMMITTEE

1. How many acres of oil shale lands have been transferred from public domain to private ownership since 1920 under the Mining Law of 1872?

A. Since passage of the Mineral Leasing Act of 1920 (MLA) approximately 430,840 acres of oil shale land have been patented as placer mining claims, in accordance with the savings clause of the MLA.

2. How much potential recoverable shale oil does the Department estimate is contained in the lands patented under the TOSCO settlement agreement as well as under the remaining oil shale mining claims and pending patent applications?

A. BLM and USGS estimates of the in-place shale oil resource contained within the 524 mining claims patented in the TOSCO settlement are 70 billion barrels. In our view, there are no shale oil reserves on these lands economically recoverable now or in the foreseeable future. We have no estimate at this time of the in-place resource on the remaining oil shale claims; however, there is little doubt that no economically recoverable reserves exist thereon.

3. In correspondence between the Department and Congressman Rahall dated July 13, 1987, the Department stated that equity demands that the Department not inquire into assessment work performance before 1972.

o How many claims have a lack of assessment work of more than 2 years prior to 1972?

A. There is no way for the Department to know how many oil shale claims had pre-FLPMA lapses of assessment work, without a massive search of county courthouse records, because there was no requirement for recordation of affidavits with BLM.

o Does this mean that a claim holder could have done absolutely no annual assessment work for 30 some years and still have a valid mining claim?

A. Yes. This is the logical consequence of section 5 of the Act of May 10, 1872, as interpreted by the U.S. Supreme Court in Wilbur v. Krushnic (1930).

o Does the Department believe this is the intent of the savings clause of the Mineral Lands Leasing Act?

A. The Department initially felt that the intent of the savings clause was to cause forfeitures of oil shale claims for lapses in assessment work performance. After Wilbur and Ickes v. Virginia-Colorado Development Corp. (1935) the Department was obliged to adjust its interpretation. We believe now that substantial compliance with assessment work performance is required but that the Government must be held to the same standard as rival locators — that is, resumption of labor prior to contest bars the Government from asserting a forfeiture on this basis. The Solicitor General, in his brief to the Supreme Court on behalf of the Department in the Tosco v Hickel case, recognized the need to challenge a claim prior to resumption and explicitly accepted this requirement as a correct interpretation of 30 U.S.C. 28.

4. The Supplemental Appropriations bill for FY 1987 (Pub. L. No. 100-71) contains a moratorium on patenting of oil shale mining claims, although several pending applications are exempted from the moratorium.

   o What is the status of the exempted applications?

A.

Patent Applications Exempt From Public Law 100-77

Public Law 100-77 enacted on July 11, 1987, prohibits the use of any funds prior to March 31, 1988, to issue any patent for oil shale mining claims except for the following patent application.

Serial No.	Applicant	Acreage	Status of Application
C-021327	Pacific Oil Co.	636.38	Patent issued on 7/9/87 (TOSCO)
C-016671	Tell Ertl, et al.	1,921.12	Patent issued on 7/8/87 (TOSCO)
C-023661	Frank W. Winegar	320.00	Patent issued on 7/2/87 (*Shell v. Andrus* court order)
C-42836	TOSCO Corp. (not in settlement)	1,880.00	No action being taken
C-43354	Marathon Oil Co.	982.92	No action being taken
C-39464	Union Oil Co.	1,216.14	No action being taken
C-38579	Exxon Corp.	3,203.80	No action being taken
C-38402	Union Oil Co.	686.84	IBLA has affirmed decision declaring claims *null & void*
C-35080	Harlan and Dorothy Hugg	1,120.00	No action being taken
C-36293	Harlan and Dorothy Hugg	2,000.00	No action being taken

o What standards is the Department using in processing these patents?

A. Processing of the pending applications is now limited to adjudication of chain-of-title documentation, publication of notice to adverse mining claimants and acceptance of the purchase price, all being done under long-standing practices without controversy.

5. Has the Department issued any oil shale patents other than those covered by the settlement agreement in the TOSCO case subsequent to that settlement?

o If so, how many?

A. Yes, a patent was issued to Frank W. Winegar on July 2, 1987, for two oil shale mining claims totaling 320 acres.

o What standards for annual assessment work did the Department apply?

A. The standard for annual assessment work applied to these claims included recognition of the resumption principle. Although the Department alleged that assessment work had lapsed for many years, no contest on this issue was raised prior to the issuance of a final certificate for patent in 1959. After issuance of a final certificate there is no obligation to perform such labor (43 CFR 3851.5) and it cannot serve as the proper basis of a contest.

6. How many oil shale patents is the Department likely to issue in the next year?

   - For each patent, please specify the date of likely issuance, location of the claims and the number of acres involved.

A. The Department is likely to issue no oil shale patents in the next year, given the state of flux in the proper standards for discovery and assessment work compliance.

7. When does the Department think shale oil will be developed on current mining claims and the patents issued under the TOSCO settlement?

A. We have no idea when such development might take place. Clearly, it is not imminent. Knowledgeable sources believe that economic recovery seems quite far off unless technological breakthroughs are made.

8. Oil shale claim holders are currently required under the Mining Law of 1872 to do $100 worth of annual assessment work. The $100 figure was most likely appropriate in 1872. What would the appropriate equivalent of that figure be now, in 1987 terms?

A. We believe that the appropriate figure for assessment work expenditures required by section 5 of the Mining Law remains $100 per mining claim per year. The number of mining claims necessary to an economic mining operation has increased many times from the days of surface-exposed vein deposits in which a claimant could make his livelihood on one or two mining claims. Thus, the total amount of labor, in real terms, expended by today's gold miners is not out of line with that expended by his 1872 counterpart.

9. Some have suggested that the oil shale mining claims be converted to leases under the Mineral Leasing act of 1920. Does the Department think that this would be good public policy?

A. The MLA already contains an express invitation for oil shale claimants to convert their holdings to leases. We know of none that have done so. The forced conversion of oil shale claims to leases is not good public policy because the holders of valid mining claims have a vested possessory right in the oil shale deposit that includes mining it without the imposition of rent and royalty payments to the Government. Furthermore, more development work has occurred on patented oil shale land than has on the proto-type Federal leases in Utah and Colorado.

10. Your testimony makes reference to an "anticipated rule making". When do you expect to issue proposed rules?

   o What issues will be addressed by these rules?

A. We intend to issue draft regulations for public comment that propose a standard for discovery of a valuable oil shale deposit consistent with the Supreme Court-sanctioned Freeman v. Summers (1927) decision. Furthermore, the draft regulations will state a proposed standard for substantial compliance with assessment work requirements of the mining law, including recognition of the resumption principle. Federal Register publication of proposed rules is anticipated for the Spring of 1988.

11. The Department had drafted oil shale legislation earlier in the year. Also, in correspondence dated October 2, 1987, with Representative Rahall the Department indicated a need for legislation defining criteria for discovery and annual assessment.

o What criteria on discovery and annual assessment does the Department think should be legislated?

A. The criteria for discovery should recognize the standard in the Freeman v. Summers decision and clarify its application elsewhere. Basically, this means that the geologic inference that certain rich beds of prospectively valuable oil shale may occur at shallow depths within a mining claim is sufficient to demonstrate a discovery. However, a physical exposure of marlstone yielding not less than 3 gallons of shale oil per ton of rock is required, as well as the showing that sound geologic reasoning in 1920 supported the inference that the upper strata of prospectively valuable rich beds (not less than 1 foot thick yielding not less than 15 gallons of shale oil/ton) occur at depths no greater than 300 feet. In the Piceance and Uinta basins of Colorado and Utah, respectively, the prospectively valuable rich beds occur within the main body of the Parachute Creek Member of the Green River Formation. In Wyoming, this rich member does not occur, thusly the oil shale claimants may not be able to establish such an inference. Instead, exposure of prospectively valuable rich beds of oil shale themselves may be necessary to meet the test of discovery.

o What other provisions should be included in legislation?

A. The criteria for challenging mining claims for failure to perform assessment work must take note of the resumption principle, at least retrospectively. However, by enactment of new legislation, the Congress can make this principle inoperative with respect to challenging future lapses of assessment work, something the Department cannot do administratively because of the Wilbur precedent.

12. Congress has in the past enacted legislation suspending annual assessment work. Committee report language (for example, S. Rep. 13, 73rd Cong., 1st Sess. 2 (1933), quoting S. Rep. 1019, 72nd Cong., 2nd Sess. (1932)) indicates that the legislation provided protection from both rival claimants and government action against the claims. What is the Department's position as to the relevancy of these statutes to the current interpretation of the assessment work requirement?

A. As we indicated above in answer to question #3, the most relevant statute to the current interpretation of assessment work requirements is section 5 of the Mining Law itself (30 USC 28). Because all remaining oil shale mining claims of record with BLM, except for 108 in Colorado, have had affidavits of assessment work filed for 1986, the resumption principle provides immunity from Government contest of any past lapses, whether or not Congress suspended the requirement for those years. The cited committee reports from 1932 and 1933 do not speak to the issue of the application of the resumption principle to Government contests and thus must be considered of historical significance only. Because they predate the Ickes decision of the Supreme Court, their continuing significance after 1935 is questionable at best.

13. What does the Department think are the legal benefits associated with the TOSCO case settlement agreement? What parts of the Finesilver decision does the Department agree with? What parts does it disagree with?

A. The greatest benefit of the TOSCO settlement was the vacating of the May 1, 1985, decision by Judge Finesilver so that it represents no judicial precedent with respect to issues such as: 1) the performance of $500 worth of cumulative labor being substantial compliance for the life of the claim, 2) estoppel operating against the Government, and 3) discovery being shown to exist where any sample within the Green River Formation, and inside the 1916 USGS classification line for prospectively valuable oil shale land, that yields shale oil upon distillation, is inference of rich beds sufficient to establish a discovery.

The Department agrees with Judge Finesilver's view as to the resumption principle barring Government contest for assessment work lapses when labor is reinitiated prior to challenge. With nearly all other parts of the decision the Department disagreed, but could not be sure of successful appeal.

QUESTIONS FROM SENATOR WALLOP

1. Some have suggested that oil shale claim holders should be required to convert their claims to leases. In your view, would this constitute a taking under the Fifth Amendments?

A. The Department believes that a forced conversion of oil shale placer mining claims could constitute a compensable taking under the Fifth amendment. Any mining claimant who has exposed, within the limits of a mining claim, sufficient minerals to constitute a discovery has exclusive possessory rights to the land and may not be deprived of that interest without due process (Best v. Humboldt Placer Mining Co., 371 US 334). The Supreme Court in the case Andrus v. Shell Oil Co., 446 U.S. 657 (1980) eliminated the requirement for oil shale mining claimants to show "present marketability." Thus the oil shale claimant who can show a discovery has been vested with an exclusive possessory right to the land. Forced conversion to a lease would diminish claimants' ultimate rights of possession and could result in claims for compensation that would include the value of the mineral and surface estates.

2. The Mineral Leasing Act provides for leasing of Federal oil shale resources and also permits the conversion of oil shale claims to leases. Why does there appear to be little or no interest in Federal oil shale leasing?

A. Expectations regarding oil shale profitability have undergone a marked decline that coincides with the world-wide cost of oil. Four large prototypes of oil shale leases were sold in the early 70's. There has been no other leasing. Subsequently, two oil shale leases in Utah (U-a & U-b), were relinquished in 1985. The two leases in Colorado have been placed in suspension, C-a in 1985 and C-b in 1987. No free market commercial production has originated on Federal oil shale leases. The principal causes for this have been the lowering of world oil prices and technological difficulties.

3. Can you please comment on the standard for discovery currently used by the Department? How long has it been utilized? How have court decisions influenced the Department's interpretation of what constitutes discovery for purposes of patenting oil shale claims?

A. In a landmark decision, Freeman v. Summers(1927), the Secretary of the Interior held that the prospective value of the rich beds of the Green River Formation was sufficient to show a discovery within the meaning of the mining law. Furthermore, he held that showings of lean oil shale at the surface led to the reasonable inference that the rich beds occurred at depth.

This standard was applied thereafter until the early 1960's when, under Secretary Udall, the Department began to challenge oil shale patent applications on discovery and other issues. The administrative culmination of this effort was the Interior Board of Land Appeals decision in U.S. v. Winegar which overruled Freeman and held that the prospective value of oil shale was insufficient to satisfy the test of discovery of a valuable mineral deposit.

The Supreme Court reviewed this issue in Andrus v. Shell Oil and reinstated Freeman as the proper standard of discovery, noting that it was a contemporaneous construction by an agency charged with administering the law, and furthermore that the Congress had sanctioned this standard when it reviewed allegations of fraudulent patenting of oil shale claims in 1930 and 1931. After Andrus the Department applied a new interpretation of the Freeman discovery standard in four cases that led to TOSCO et al. v. Hodel.

The post-Andrus standard recognized the sufficiency of the prospective value of the rich beds of oil shale to meet the discovery test. However, in U.S. v. Weber Oil the IBLA held that the geological inference criteria of Freeman was based upon flawed geologic concepts and that to satisfy the test of discovery a showing of lean oil shale must be demonstrated to connect to the prospectively valuable rich beds within the boundaries of the mining claim. The oil shale patent applicants appealed this holding (and many others) to the Federal District Court, which ruled in their favor. Basically, Judge Finesilver decided that a sample yielding any shale oil from a mining claim within the Green River Formation, where classified as prospectively valuable by the USGS, satisfies the Freeman standard of discovery.

We believe this to be in error and, because TOSCO V. Hodel is now vacated, intend to propose a standard of discovery (through draft regulations that will be published for public comment) that clarifies our position. The proposed standard recognizes the prospective value of the rich beds of oil shale as sufficient for patent.

The prospectively valuable rich beds of oil shale are those that meet the USGS classification criteria of beds not less than 1 foot thick, yielding not less than 15 gallons of shale oil per ton of rock. In the Piceance and Uinta basins of Colorado and Utah respectively, this standard is met by outcrops of the main body of the Parachute Creek member of the Green River Formation. In Wyoming, oil shale claims containing outcrops of Laney Member rich beds have been patented in the past.

As in Freeman v. Summers, the proposed standard of discovery contains criteria applying geologic inference in limited instances. That is, in the absence of exposures of prospectively valuable rich beds themselves, a discovery will be shown to exist where pre-1920 exposures of marlstone tongues containing not less than 3 gallons shale oil/ton of rock are inferred to connect to the prospectively valuable rich beds of oil shale, the upper strata of which are inferred to lie at depths similar to that of the claims at issue in Freeman, approximately 300 feet. The inferred connection of the lean oil shale tongues (marlstone) need not occur within the confines of the oil shale mining claim. In the Piceance basin the newly named tongues of the Parachute Creek Member that lie within the barren Uinta Formation sandstones and siltstones appear to generally meet these criteria. The less well-mapped Uinta, Green River and Fossil basins may not contain such qualifying tongues, in which case exposure of the prospectively valuable rich beds will be necessary to meet the test of discovery.

4. What has been the record of the Department since the early 1900's in requiring annual assessment work on oil shale claims? What have the courts said in this regard? In your view, would it be appropriate to retroactively cancel claims on which annual assessment work was less than $100 per year?

A. The Department attempted to invalidate oil shale mining claims shortly after the passage of the Mineral Leasing Act in 1920. Numerous oil shale mining claims were invalidated for nonperformance of annual assessment work. In 1930, the Supreme Court in the case of Wilbur v. Krushnic (280 US 306) held that the Government must behave as a rival locator and could not invalidate oil shale mining claims if the work was resumed prior to the initiation of contest proceedings. In 1935, the Court went even further in Ickes v. Virginia-Colorado Development (195 US 639), holding that the Department had no jurisdiction to invalidate claims for nonperformance of assessment work, since failure to perform assessment work was only to the benefit of a rival claimant. In 1970, the Supreme Court reconsidered the jurisdiction question in Hickel v. TOSCO (400 US 48) and found that there was jurisdiction for the Department to invalidate oil shale mining claims if the assessment work performed upon them did not amount to "substantial compliance." Most important, the court declined to overrule Krushnic and Virginia-Colorado and remanded the issue to the District Court. Some related issues were argued in TOSCO v. Morton, which the Department lost and on which an appeal was vacated and the case again remanded to the District Court so that all legal issues including assessment work could be addressed. In addition, where needed, other issues were to be remanded to the Department for completion of the administrative record. The administrative proceedings, carried out at the instruction of the District Court culminated in TOSCO v. Hodel (611 F.Supp. 1130). In this last case, the Department lost on all issues related to assessment work.

Throughout all of the above litigation, no decision overturned the Court's holding in Krushnic that the resumption doctrine in 30 USC 28(a) did apply to the Government if it chose to act as a rival locator. In our view it would be improper for the Department to retroactively invalidate oil shale mining claims for failure to perform annual assessment work, particularly if the mining claimant had resumed the work prior to the initiation of contest.

5. Critics have charged that the Federal government is selling its land for $2.50 per acre in patenting oil shale claims. What is your view on this charge?

A. A miner pays a fee set by the mining laws (30 USC 37) when applying for a patent. In the case of oil shale placer mining claims that price is set at $2.50 per acre. This expenditure normally represents a fraction of the costs incurred by a claimant in the identification, evaluation and development of a valuable mineral deposit. The potential for jobs, development and revenue generated at all levels more than offsets the perceived unfairness of the current statutory fee. Further, the use of the term "sale" creates a false impression. A sale generally involves a "willing seller" and a "willing buyer". The mining laws (30 USC 22 et seq.) create an absolute possessory right in the holder of a valid mining claim. There is no right of refusal on the part of the Federal government if the mining claimant seeks full fee title and pays the purchase price specified by the mining laws. This transaction certainly does not involve a "willing seller", even though there is a "willing buyer". The Department's actions from 1961 to 1985 can only be viewed as those of an "unwilling seller". However, the courts did not accept the concept of "unwilling seller" but rather that the Federal government was a directed conveyor that had no discretion to charge more than the legislated price for the land.

APPENDIX II

Additional Material Submitted for the Record

2605 Stanford Ave.
Boulder, CO 80303
Oct. 14, 1987

The Honorable Senator John Melcher, Chairman
Senate Subcommittee on Mineral Resources
Development and Production
Washington, D. C. 20510

Dear Chairman Melcher:

When I spoke to you in Denver several weeks ago about your plans for hearings on oil shale policy matters you asked for any questions which I cared to submit. I have followed Department of Interior disposals of U. S. public domain lands based on pre-1920 oil shale mining claims now for a quarter of a century, going back to the time when I was an analyst in the U. S. Bureau of the Budget.

I am submitting a number of key questions relating to the past and possible future disposals of extremely valuable oil shale lands by Interior for $2.50 an acre based on pre-1920 mining claims which competent people in the Department at the staff level have long regarded as being questionable. I am also submitting a few selected exhibits on these matters. I request that you take up these matters in your hearings and in a subsequent followup investigation--and that you include my submittals in your printed hearings, a copy of which hearings and ensuing Senate reports I request you send me.

Here are my suggested questions regarding pre-1920 oil shale disposals on which I believe the Congress has an obligation to inform the American people as a matter of public interest:

1. How many acres of oil shale lands have been transferred from the U. S. public domain to private ownership by grants of patents based on oil shale mining claims filedbefore the Mineral Leasing Act of 1920 became effective? When did these disposals take place year by year, and how much did the U. S. Treasury realize from the sale of these lands?

My rough estimate is that at least 430,000 acres of rich oil shale lands have been "sold" thus--including some 82,000 pursuant to the Interior Department's 1986 "settlement" with claimants under the abortive Tosco v. Hodel (1985) decision.

2. How much potential recoverable oil did Interior experts estimate was contained in the lands thus disposed? What would be the value of such oil if it were recovered, assuming present oil prices? If these lands were still in public ownership, and regular royalty rates and bonus arrangements applied to the lease of these lands, how much could the U. S. Treasury over the years have gotten in such income? What part of these proceeds wouuld have gone to the State of Colorado?

Enclosed is a clipping from the Rocky Mountain News of July 17, 1987, "Oil Shale Move May Cost U. S. $210 Billion." This appears to be an estimate of revenue loss to the U. S. prepared by staff of the House Appropriations Committee on just the impact of the recent 82,000 acre "settlement" by Secretary Hodel-Griles-Burford.

Even before the 82,000 acres were patented, I had estimates that the recoverable oil content of previous oil shale land disposals could run up to 300,000,000,000 barrels--some 10 times the oil in in identified U. S. oil fields.

3. What is the basic rationale for the granting of patents to private individuals on mining claims located on the public domain? Is not the purpose of the mining laws in this respect to put the minerals into production so the economy will benefit?

The pre-1920 oil shale mining claims were all filed at least 66 years ago. Yet, even with multi-billion-dollar Federal subsidies, there is no economically viable commercial production of oil from the 430, 000 acres of oil shale lands which have been transferred to private ownership at $2.50 an acre. Were these transfers a mistake? Were they a "land grab" by special interests which dominated a somnolent Department of Interior? Did the Department of Interior properly discharge its duties as Trustee of the U. S. oil shale domain on behalf of the people of America?

4. What companies and individuals now own major acreages of the oil shalelands hitherto disposed by the U. S. Government? How much did the present owners pay for these patented lands?

What current actions are the present major owners of the 430,000 acres of oil shale lands divested from the American public taking to develop current production of oil from the oil shale, if any?

At forseeable rates of oil production from these oil shale lands, how many years would it take to exhaust the reserves already in private ownership? Was the 1986 divestiture of 82,000 acres justified by any reasonable interpretation of the U. S. mining laws?

What part of the oil shale lands previously disposed is actually in areas containing reserves actually suitable for development? Has the past pattern ofdisposals by Interior through grants of patents been suitable for actual development--or has it been a helter-skelter granting of land ownership to claimants for speculative purposes?

What are the real prospects for oil production from all the privately held oil shale lands previously divested from the public domain "for a song"? How can any more disposals be contemplated?

5. Starting with 1920 has the Department of Interior discharged its responsibilities for managing the oil shale lands properly and in the public interest?

Did the Department interpret the mining laws properly when it came to oil shale claims, or did it bend the interpretations under pressure from the claimants and their supporters in the Congress and in the Executive Branch? Did the Department set up procedures and information systems to make sure that only valid claims were approved--or did it operate in an uncoordinated manner and let claimants pressure Departmental employees to push through patents? Did the Department coordinate the work of its attorneys, BLM lands people, and geologists and put on qualified witnesses in administrative contests and work in tandem with the Justice Department to prepare fully and ably litigate court cases--or did the Department, in effect, default to claimants? Did the Department encourage and reward personnel who were motivated to prepare the Government's defenses against questionable oil shale mining claims--or did it discourage preparation of cases, minimize the charges it used, and run motivated staff out of oil shale work and even out of the Department?

6. Department of Interior briefs show that the administrative decision in the Freeman v. Summers case in 1927 was based on erroneous assumptions regarding the geological structure of the oil shale and stated ex cathedra a different economic rule for oil shale than the general rule for mineral mining claims generally established in Castle v. Womble (1894) that to meet the statutory requirements of the mining laws there must be "reasonable prospect" of "developing a valuable mine" by a "prudent" miner.

Why has the Secretary of Interior allowed Freeman v. Summers to stand when the Department knows that it was a politically-pressured decision that was wrong on facts and law? Where are the oil shale claims on which prudent miners in the last 70 years have developed profitable oilshale production which the mining laws contemplated to be the rationale for patents? What prudent miners are currently mining oil shale profitably on any of the 430,000 acres patented by the Government since 1920?

I enclose some 40 pages of excerpts form the first of 5 volumes of a United States Department of Interior, Bureau of Land Management, "Post Hearing Brief and Appendix for the Contestant" in U. S. v.Frank W. Winegar; Shell Oil Co. and U. S. v. D. A. Shale Inc. , dated May 20, 1968. These excerpts will give your Committee an idea of the more detailed information in the entire 5 volumes on the defects of Freeman v. Summers. See also Vol. 5, pp. A-1153 ff. on the Freeman battle. Yet the Freeman ruling is cited favorably in Tosco v. Hodel (1985).

7. Why did the Department of Interior fail to use all avaliable charges in contesting oil shale claims? In Hickel v. Tosco (1970) the Supreme Court gave the Department full opportunity to contest all outstanding oil shale claims on all charges. The Department did not do so. It limited severely its list, and then failed to pursue the issue of loss of discovery on claims when oil prices dropped to $1 a barrel or less in the 1930s and clearly led to wholesale abandonment of oil shale claims as poor economic ventures. Many of those abandoned claims were picked up later for pennies an acre--as the Interior briefs cited above describe.

Further information by Department of Interior lawyers on Freeman v. Summers defects is contained in Post Hearing Brief(s) in 1982 in the case of U. S. v. Weber Oil Co. in contests 193, 260, and others. These briefs should be readily available from the Department.

In my letter to the Honorable Nick Joe Rahall, Chairman of the House Subcommittee on Mining and Natural Resources of Sept. 4, 1986, on an earlier House bill I outlined at pp. 5-6 the array of charges the Department could have considered in contesting oil shale claims to make sure that they were valid. I enclose a copy of that letter for your use and for inclusion as support for my present letter to you inasmuch as Chairman Rahall elected not to publish the record of his hearing, so this information is not available to the interested public.

8. Why did the Departments of Interior and Justice fail to disclose properly to the Supreme Court in Andrus v. Shell (1980) that Freeman v. Summers was a wrong ruling on geology and also fail to clarify for the Court the economics behind the "prudent man" rule of Castle v. Womble that the discounted value of the stream of reasonably projected future income for each mining claim must exceed the discounted value of the development and operating costs for the claim to justify a valid claim under the mining laws?

Interior attorneys in Denver objected strenuously to the rulings first by the Tenth Circuit Court of Appeals in Shell Oil Co. v. Andrus and then in Andrus v. Shell at the Supreme Court that the erroneous administrative rulings carried over from Freeman v. Summers could not be changed by the Department. They proposed urgently to the Washington offices of the Department of Interior that rehearings should be sought for petition. But the Department turned them down. I enclose a memorandum of February 12, 1979 prepared in Denver--and there was other correspondence, too. It is suggested that the Congress request all the correspondence on those Court decisions from the Department and find out why competent staff recommendations to appeal those cases were turned down. The public's misfortune is that Andrus v. Shell is cited in Tosco v. Hodel as support for that unfortunate decision in 1985.

9. Why did the political appointees of the Reagan administration turn down urgent, documented staff recommendations that Judge Sherman Finesilver's District Court ruling in Tosco v. Hodel (1985) be appealed to higher Courts? As you no doubt know, Solicitor's staff of the Department of Interior prepared a cogent draft paper several criticizing that decision and urging its appeal. Their view was shared by the State Director of BLM, Colorado, and by the Principal Deputy Solicitor in Washington, as the enclosed memoranda by them indicate. I suggest that you have your staff get the staff analysis from Interior and put it in the hearing .

I should add that the Department's legal assertions in support of its settlement on patenting the 82,000 acres which was announced in 1986 has been described to me as requiring careful reanalysis to determine if the Department's statements were correct. I believe that the questions listed in the August 25, 1987 letter to the Honorable J. Bennett Johnson, Chairman, Senate Committee on Energy and Natural Resources, by Douglas Robotham of Denver--a copy of which apparently was also sent to you--merit full investigation by your Subcommittee and by the Congress at large. I suggest that his letter be put in your hearings. so the questions will be identified.

10. Why has oil shale administration by the Department of Interior repeatedly cost able, dedicated career employees damage to their careers and even loss of Interior jobs because they sought to thoroughly examine the validity of pre-1920 oil shale claims while political appointees of the Department repeatedly adopted policies which led to patenting of huge quantities of valuable oil shale lands?

Ralph Kelley, Chief of the Field Division in the Department's Denver region,had served in the Department for 25 years. He had directed his staff in examinations of claims which had resulted in many of them being declared null and void. He questioned the correctness of First Assistant Secretary E. C. Finney's decision in Freeman v. Summers. The Secretary of Interior ordered him into Washington. Kelley, feeling trapped, went public with a series of articles in the New York World. He resigned and was denounced by President Hoover. While his articles led to Senate hearings he was never given a chance to explain his side of the case. (See pp. A-1153 ff. of Post Hearing Brief , Vol. 5, dated May 20, 1968.)

The disposal process set in motion by E. C. Finney in 1927 picked up steam in the 1940s and 1950s when much of the disposals occurred. However, close to the end of the Eisenhower administration, research into the "old decisions" of the 1930s and into the questionable basis of Freeman v. Summers by a young Interior attorney with training and experience in land law led to a halt on patenting. Despite heavy pressures by a large covey of oil company lawyers on the Denver Regional Solicitor's Office, the Eisenhower administration held firm on the embargo.

However, in the Kennedy and early Johnson administration years, heavy pressure was put on the young lawyer whose work had revealed enough defects in the oil shale claims to stop patenting. He was pressured by claimants and attacks on their behalf by a powerful Congressman who went to the top of the Department with inflammatory accusations. His carefully-drawn plans for preparing contests in the cases he was handling were summarily and without notice withdrawn by Denver Regional Solicitor (the late) Palmer King. The young attorney was ordered into Washington on trumped up allegations. Similarly, a number of other attorneys in the Interior Regional Solicitor's Office were summarily run out of their jobs, including by use of "form" affidavits by other colleagues who choose to preserve their jobs. In Washington the attorney who was having his career jeopardized just because he felt obligated to protect the public domain against divestiture on the basis of questionable oil shale claims was subjected to vicious ad hominem attacks by unidentified top Interior officials.

The events in the foregoing paragraph occurred during the time that The Honorable Stewart Udall was Secretary of Interior assisted by Assistant Secretary John Carver and Solicitor Frank Barry. This was the period when Interior staff drafted legislation to validate all pending oil shale claims and Senator Allott of Colorado introduced a similar bill which feisty then-editor J. R. Freeman of the Colorado Farmer and Miner called "bundles for billionaires". For his series of perceptive articles under the general heading of "The Multi-Billion Dollar Grab of Oil Shale Lands" he won the National Newspaper Association's Herrick Editorial Award in June 1967. His series is supposed to be at the Library of Congress. The distressing destruction of dedicated civil servants in Interior was explicitly covered along with other oil shale disposals problems in Interior in a series of depositions in U. S. v. Mobil and Equity Oil, Civil Action No. 4135, U. S. D. C., CO, a case involving an erroneously issued patent. The case was settled out of Court and Judge Finesilver sealed the record. The Congress should look into that set of files. to see how Interior destroyed its good civil servants on the apparent suspicion that they were too honest to tolerate unwarranted divestiture of oil shale lands from the public domain. Now that the oil companies have gotten the 82,000 acres as a result of the 1986 settlement, perhaps the Department of Interior with the concurrence of the beneficiary oil companies might be magnanamous enought to make amends to, and even give some redress to, those good and able workers who were so seriously damaged without any proper cause. The Congress ought to give Interior a push on this. I, personally, would like to know why, after my retirement from the OMB, the Department of Interior fingered me for four days of deposition in 1975 in the Mobil case.

Starting with the years of Secretary Udall, who seems to show a distressing ignorance of the seamy actions that went on under his wing on oil shale, the Department of Interior has followed the practice of minimizing effective preparation of contests and limiting the charges on which oil shale claims were contested. The Department sent a few, at time inexperienced lawyers backed by few and at times no competent witnesses, against the phalanxes of oil company attorneys, some of whom have literally spent their lives in remunerative employment converting questionable claims into patented lands worth thousands of dollars an acre in the market and containing billions of barrels of potentially recoverable oil if ever a process is developed which can squeeze it out of the sedimentary rocks. The excellent, instructive "post Hearing Brief(s)" do not substitute for competent presentation of evidence by qualified witnesses in contests and Court cases.

With the foregoing grim outcomes for professional staff members who put their best analysis on the line in a Department subservient to claimants, it is no wonder that existing legal and lands experts in Denver who have written critical analyses of Tosco v. Hodel have been loathe to appear and testify before the Congress on the 82,000 acre Hodel settlement unless they are subpoenaed, and maybe not wholeheartedly then. I have seen former Interior personnel at close range whose careers there were summarily terminated just because they upheld professional standards on oil shale. That is a sordid way for a Federal Department to behave. I suggest that your Subcommittee explore with Interior witnesses whether they will guarantee any Interior staff who testify before the Congress assured non-punishment in writing. Moreover, the Department ought to start with reparations and honors for prior employees whom the Department literally destroyed professionally, possibly with the concurrence of the Executive Office of the President.

10. Why has the Congress never conducted a thorough, professionally staffed review by qualified legal, land, geologic, economic, and administrative experts of the mishandling of oil shale lands by the Departments of Interior and Justice? How can it be that 82,000 acres of valuable lands containing billions of barrels of oil can be "sold" for $2.50 an acre under a faulty Tosco v. Hodel decision which even the Department of Interior recognizes is so bad that the whole decision is "vacated" after the deed is done pursuant to the terms of the "settlement." How can the Congress allow 82,000 acres to go in the settlement when only perhaps some 17,000 acres were litigated under Tosco --and the remainder were under quite different contests and had different charges, including even possibly charges of fraud?

The Congress held hearings on oil shale in the early 1930s and in the 1960s, and these have been cited as validating prior Departmental decisions --although in neither case were knowledgeable Interior employees allowed to make their side of the case public.

Nor has the Congress ever conducted a full oversight investigation of oil shale disposals, say with the assistance of experts from the GAO. It is time that the Congress stop allowing giveaway-minded political appointees from Interior plus self-interested claimants to make their one-sided case. Instead,for once,the Congress should set about getting the real facts on the disposals of oil shale,from the standpoint of the public interest this time.

In support of the foregoing suggestion I offer for inclusion in your hearing record testimony which I gave before the House Subcommittee on Fossil Fuels on October 27, 1975. This was, of course, before the abortive Andrus v. Shell (1980) decision. Had the Congress listened to me then and launched a proper investigation, it could very well saved the 82,000 acres of rich oil shale lands which the Reagan administration dissipated in 1986. Let me point out, that in the 1960s many of us perceived that oil shale revenues would one day pay off the public debt.

From what I know about current statistics at least 260,000 acres of oil shale public domain is still at risk from pre-1920 oil shale claims, close to 3/4 of which is in Colorado. It would be tragic to dissipate the rest of this public domain patrimony on the heels of the 430,000 acres already literally given away.

Recommendations for the Subcommittee On These Multi-Billion-Dollar Issues

1. Embargo completely all further patenting of public domain oil shale lands until the Congress can get the full facts on what has transpired on disposals in the past and a full analysis of erroneous disposals have been made without regard to the intent of the U. S. mining laws as they relate to oil shale and other minerals.

2. Enact legislation that stipulates that before the Department of Interior undertakes to proceed any further oil shale patent applications, after the Congress gives go ahead to the Department, it shall:

a. Investigate each such claim fully against all possible charges which may be applicable.

b. Contest each claim on the basis of all sustainable charges and present its evidence through competent, qualified experts including geologists, economists, land personnel, and attorneys--as well as by customary briefs, etc.

c. Litigate any such claims in Court cases, up to the highest level if necessary, using talent as cited in "b" and in conjunction and full coordination with Justice Department litigators.

d. Establish under one professional head a coordinated process for handling oil shale cases which process utilizes the various multi-disciplinary specialties necessary to the field, records, and other investigations and fully prepare and conduct contests of oil shale claims as may be necessary in the future.

3. Enact legislation which directs the Departments of Interior and Justice to undertake any action necessary to recover all past oil shale lands which may have been patented contrary to law in any cases where such erroneous disposals are now known to have occurred or may be subsequently discovered to have occurred as the result of the Department's or the Congress' investigations.

4. Enact a law authorizing a full review of past and present problems in the handling of public domain oil shale lands by the Departments of Interior and Justice by a Joint House-Senate

Investigatorial Committee--which law also directs and authorizes the GAO to provide and hire any expert staff needed for the review. This review should cover the past history of oil shale claims pre-1920; the history of disposals on the basis of such claims; the history of efforts to develop oil shale and prospects for such development; the relation of oil shale to the Nation's energy self sufficiency; an analysis of the various charges bearing on the validity of pre-1920 claims; the background of and the legal correctness of Freeman v. Summers and Andrus v. Shell and Tosco v. Hodel decisions; the economic validity of each of these 3 decisions taking account of criteria used in the general mining laws; a full review of the 1986 "settlement" and its subsequent execution; a review of the administrative and litigational performance of the Departments of Interior and Justice in protecting the public interest in oil shale public domain ; and identification of instances in which pre-1920 claims may have been patented contrary to law as enacted by the Congress. The Congress should direct that this oversight review shall be concluded no later than September 30, 1989 and authorize $2 million for the purpose plus use of existing GAO and Congressional staff.

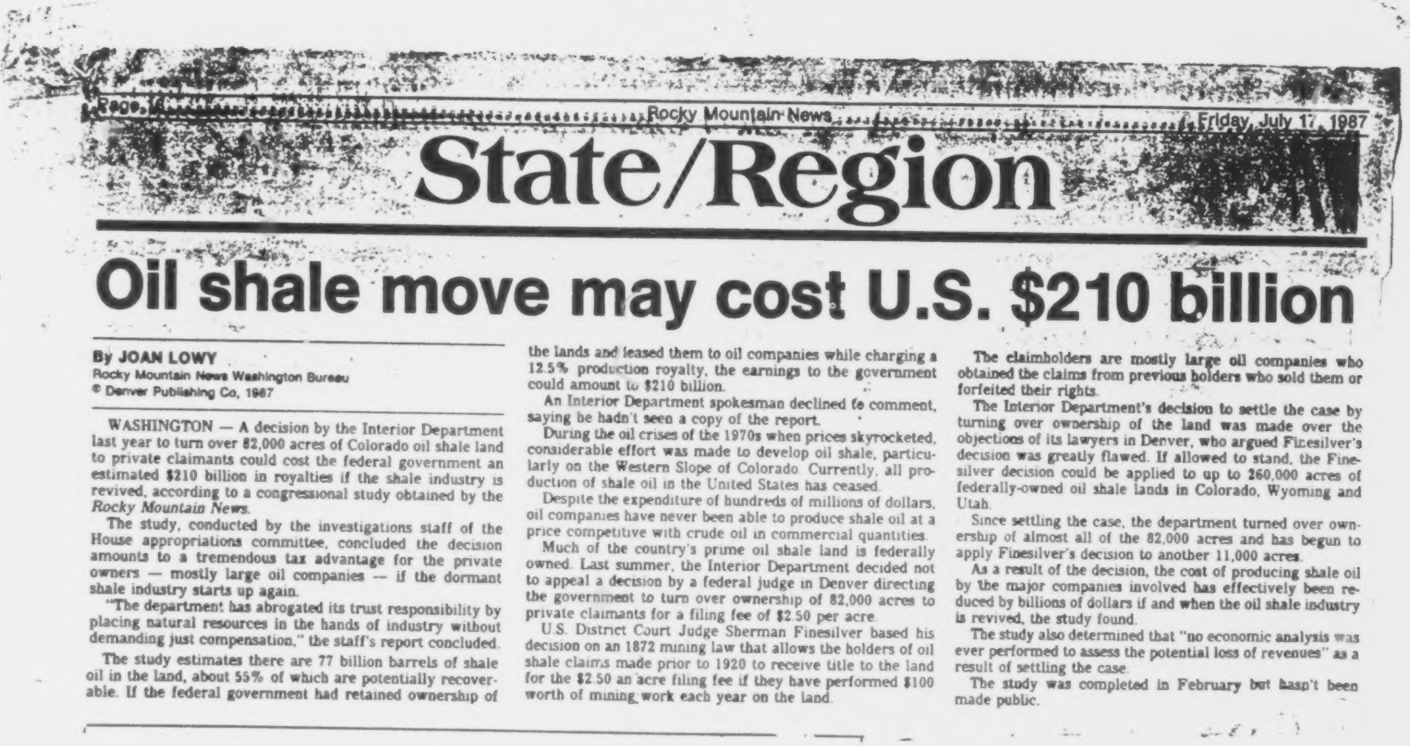
Respectfully,

Michael S. March

Michael S. March, Ph. D.
303-494-4871

Enclosures:

"Oil Shale Move May Cost U. S. $210 Billion"
Excerpts from May 20, 1968 Interior Brief
Letter by March to Honorable Rep. Udall, 9/4/86
Interior Acting Solicitor's Request of 2/12/79 for Appeal of Shell Case
State BLM Director Urges Appeal of Tosco v. Hodel, Oct. 1985
Principal Assistant Solicitor Horn Urges Appeal of Tosco, Undated
Statement by March on Fossil Fuels, 10/27/75



Page [illegible] Rocky Mountain News Friday, July 17, 1987

State/Region

Oil shale move may cost U.S. $210 billion

By JOAN LOWY
Rocky Mountain News Washington Bureau
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WASHINGTON — A decision by the Interior Department last year to turn over 82,000 acres of Colorado oil shale land to private claimants could cost the federal government an estimated $210 billion in royalties if the shale industry is revived, according to a congressional study obtained by the *Rocky Mountain News*.

The study, conducted by the investigations staff of the House appropriations committee, concluded the decision amounts to a tremendous tax advantage for the private owners — mostly large oil companies — if the dormant shale industry starts up again.

"The department has abrogated its trust responsibility by placing natural resources in the hands of industry without demanding just compensation," the staff's report concluded.

The study estimates there are 77 billion barrels of shale oil in the land, about 55% of which are potentially recoverable. If the federal government had retained ownership of the lands and leased them to oil companies while charging a 12.5% production royalty, the earnings to the government could amount to $210 billion.

An Interior Department spokesman declined to comment, saying he hadn't seen a copy of the report.

During the oil crises of the 1970s when prices skyrocketed, considerable effort was made to develop oil shale, particularly on the Western Slope of Colorado. Currently, all production of shale oil in the United States has ceased.

Despite the expenditure of hundreds of millions of dollars, oil companies have never been able to produce shale oil at a price competitive with crude oil in commercial quantities.

Much of the country's prime oil shale land is federally owned. Last summer, the Interior Department decided not to appeal a decision by a federal judge in Denver directing the government to turn over ownership of 82,000 acres to private claimants for a filing fee of $2.50 per acre.

U.S. District Court Judge Sherman Finesilver based his decision on an 1872 mining law that allows the holders of oil shale claims made prior to 1920 to receive title to the land for the $2.50 an acre filing fee if they have performed $100 worth of mining work each year on the land.

The claimholders are mostly large oil companies who obtained the claims from previous holders who sold them or forfeited their rights.

The Interior Department's decision to settle the case by turning over ownership of the land was made over the objections of its lawyers in Denver, who argued Finesilver's decision was greatly flawed. If allowed to stand, the Finesilver decision could be applied to up to 260,000 acres of federally-owned oil shale lands in Colorado, Wyoming and Utah.

Since settling the case, the department turned over ownership of almost all of the 82,000 acres and has begun to apply Finesilver's decision to another 11,000 acres.

As a result of the decision, the cost of producing shale oil by the major companies involved has effectively been reduced by billions of dollars if and when the oil shale industry is revived, the study found.

The study also determined that "no economic analysis was ever performed to assess the potential loss of revenues" as a result of settling the case.

The study was completed in February but hasn't been made public.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

- - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

Contestant, :

v. : CONTEST COLORADO 359

FRANK W. WINEGAR, :

Contestee, :

SHELL OIL COMPANY, :

Intervenor. :

- - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

Contestant, :

v. :

D. A. SHALE, INC. : CONTEST COLORADO 360

Contestee. :

- - - - - - - - - - - - - - - x

POST HEARING BRIEF

AND

APPENDIX FOR THE CONTESTANT

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POST HEARING BRIEF AND APPENDIX FOR THE CONTESTANT

Introduction

The record in this proceeding is voluminous. The transcript of the hearing (40 days of testimony) covers some 5,000 pages. The Contestant presented the testimony of 17 witnesses at the hearing and the Contestees offered 3 witnesses. In addition, the Contestant submitted by way of exhibits the prepared testimony of 8 witnesses and the depositions of 9 witnesses. The Contestees offered by way of exhibits the prepared testimony of 2 witnesses and the depositions of 4 witnesses. The parties offered some 1700 exhibits with an estimated volume on the order of 30,000 pages.

In view of the extensive record, the Contestant is presenting a Brief dealing principally with the applicable law relating to the issues that have been raised for decision and a supporting Appendix setting forth in some detail the relevant facts relating to the issues presented for determination. The Appendix represents an attempt to present a comprehensive factual picture by separate topics or subjects of the story of oil shale. In some instances the sections of the Appendix deal specifically with the facts pertinent to a single argument. Most of the sections of the Appendix, however, contain facts relevant to several arguments. The various arguments in the Brief contain a short summary of at least a portion of the relevant facts found in the various sections of the Appendix. However, since the Appendix is a summarization of the evidence, no attempt has been made to set forth a further detailed summary in connection with each argument in the Brief.

The Contestant found it necessary, because of the size of the Brief and the Appendix, to place each argument of the Brief and section of the Appendix in final form as soon as they were completed. There was no opportunity to review and coordinate the entire product in draft form. Accordingly, there is in some instances some repetition of material.

The Contestant's exhibits are referred to with the prefix "G" and the Contestees' with the prefix "C." Unless otherwise noted, all emphasis by way of underlining in the Brief and Appendix has been supplied by the Contestant.

Statement

Oil shale is a fine-grained, laminated, sedimentary rock containing organic material (sometimes called "kerogen") from which appreciable amounts of oil can be obtained by the application of heat. Oil shale does not contain any appreciable amounts of oil as such. When the rock is crushed and heated to certain temperatures the solid organic material derived from preexistent aquatic plant and animal life undergoes a chemical transformation that produces a substance known as shale oil. Raw shale oil bears little resemblance to natural crude oil. It is a black, highly-viscous substance that contains appreciable quantities of nitrogen and sulfur. Once it cools below 90° Fahrenheit it is as difficult to pour "as a barrel of frozen jello." In order to upgrade shale oil to the crude oil level most of the nitrogen and sulfur must be removed and the wax-forming components, that are responsible for shale oil's annoying characteristic of hardening once it cools, must be eliminated or rearranged.

It is generally believed that oil shale was formed during millions of years of deposition of aquatic plant life and some animal life mixed with precipitated mineral matter at the bottoms of quiet lakes and lagoons. The relationship between the organic matter and the mineral matter in the deposits determines how much shale oil can be obtained. At one extreme are deposits extremely rich in organic matter that yield over 100 gallons of oil per ton of material and at the other extreme are the lean shales yielding less than 15 gallons per ton.

Oil shales are widely distributed throughout the world land areas in sedimentary rocks of various geological periods. Deposits have been reported in 38 countries. Foreign oil shale operations designed for the production of fuels had their beginning in France in 1838. Subsequent operations include those started in Scotland (1850), Australia (1865), Brazil (1881), Germany (1916), Sweden and Estonia (1921), Spain (1922), Manchuria (1929), and South Africa (1935). A number of the foreign operations continued, although in some cases only intermittently until recent years, then succumbed to economic pressures. When directly faced with competition from natural crude oil the demise of an oil shale operation has been rapid.

Oil shales and other similar oil yielding materials are of common occurrence and widely distributed throughout the land areas of the United States. Deposits of varying nature and extent have been reported in 30 states. In about 1850 a material effort was made in America toward developing an oil shale industry. From that year until approximately 1860 more than 50 plants were built and operated in the eastern United States and Canada. The principal product was illuminating oil for lamps. When the American petroleum industry came into being with the discovery of "well" petroleum in 1859 the "shale oil" plants were abandoned or adapted for refining natural petroleum.

The oil shale deposits in what has been termed the Green River formation in the states of Colorado, Utah, and

Wyoming are as a general proposition richer and thicker than most of the other extensive deposits of widespread occurrence throughout the United States. Many of the other deposits have, however, attracted some attention and interest (along with the oil shale of the Green River formation) from the standpoint of possible future commercial utilization. This was particularly true during the oil shale speculative fever of the 1920 era when the eastern shales were believed by some to have certain advantages over the western shales that might offset the lower oil yields. Some of the advantages that were noted were that the eastern shales were nearer centers of industry and population, were believed to be easier mined, and were thought to yield a higher grade of crude shale oil.

The Green River formation covers an area in excess of 16,000 square miles in the states of Colorado, Utah, and Wyoming. The formation has been divided by the geologists into various units or members based upon the characteristics and composition of the different rock types throughout the formation. The Parachute Creek member of the Green River formation consists in great part of beds of oil shale of varying richness with intervening beds of marlstone, tuff, and some sandstone. The oil shale deposits in this member were laid down in gigantic lakes that existed over millions of years. The so-called Evacuation Creek member of the Green River formation overlies the Parachute Creek member and forms the surface (except where erosion has occurred) in the area of the Green River formation in Colorado.[1] The Evacuation Creek member is predominantly sandstone interbedded with thin units of marlstone. It contains in places thin low-grade deposits of oil shale laid down in small isolated ponds or pools of water that eventually formed after the large lakes, in which the oil shale of the Parachute Creek member was deposited, went out of existence and the Green River epoch had passed through an extensive period of stream deposition. The oil shale deposits in this member because of their thinness, leanness, and limited areal extent compare most unfavorably with the oil shale deposits of widespread occurrence throughout the United States that have from time to time received some attention.

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[1] The Evacuation Creek member as presently designated in Colorado corresponds to the overlying Uinta formation in Utah. The Evacuation Creek member in Utah consists of rock types similar to the uppermost part of the Parachute Creek member in Colorado.

The richest series of oil shale beds in the Green River formation have been termed the Mahogany Ledge or Zone. This unit, in both Colorado and Utah is in the upper portion of the Parachute Creek member of the formation. It ranges in thickness in Colorado from some 40 to 90 feet and as a general proposition is assumed to have an overall average oil yield of about 30 gallons per ton of rock. The unit is not all oil shale and the different beds of oil shale yield varying amounts of oil. The oil shale of the Mahogany Ledge or Zone is the oil shale of interest today from the standpoint of possible future commercial utilization by underground mining and aboveground retorting. The richest series of oil shale beds in the Mahogany Ledge or Zone have been termed the Mahogany Bed. This unit also varies in thickness and richness resulting in part from the difference in distance from the depositional center of the lake. This unit, at least at one point within the area of the contested mining claims, is about 8 feet thick and has an overall average oil yield of 50.5 gallons per ton of rock. The oil shale of this unit was of interest to some in the 1920 era from the standpoint of possible future utilization.

The Mahogany Ledge can be seen outcropping in cliff faces over a distance of some 1700 lineal miles in Colorado and Utah. Where the Mahogany Ledge does not outcrop in the cliff faces it is presumed on the basis of geologic inference to underlie a good portion of the area covered by the Green River formation. The thin lean beds of oil shale of limited areal extent in the Evacuation Creek member of the formation are found hundreds of feet (up to 1600 feet) above the presumed Mahogany Zone and Mahogany Bed at depth. They are separated from the oil shale of the Mahogany Zone and the Mahogany Bed by hundreds of feet of sandstone, claystone, limestone, and other rock types having characteristics and origins completely different from oil shale.

Very little interest was shown in the oil shale of the Green River formation prior to about 1913. With the commencement of field work of a reconnaissance nature by the Geological Survey in 1913 a few local residents began to take a second look at the oil shale, which was readily apparent in the cliff faces throughout the area. The interest increased and expanded as the result of World War I, the withdrawal of oil shale from further disposition under the homestead and other agricultural laws by the Geological Survey because of its possible future value as a source of petroleum and nitrogen, the establishment of Naval Oil Shale Reserves for the possible future use of the Navy, promotional activities engaged in for a variety of reasons by various individuals and agencies, and certain ill-founded pessimistic predictions that the United States was fast depleting its reserves of natural petroleum.[2/]

[2/] For each year between 1915 and 1923 (the period of greatest interest in oil shale) production of natural crude oil exceeded consumption, reserves (which simply had to be pumped from the

Between 1916 and February 25, 1920, the date of the Mineral Leasing Act, which withdrew deposits of oil shale, oil and gas, and certain other nonmetalliferous minerals from the operation of the mining laws,[3] thousands of oil shale claims were plastered on a wholesale basis over millions of acres of oil shale lands in the states of Colorado, Utah, and Wyoming. A large portion of the claims covered lands in the Evacuation Creek member of the formation that did not contain any exposures of the rich oil shale in the Mahogany Ledge. In many instances, if not most, recorded location certificates covered 160 acres (generally a quarter section of land) with the claims allegedly being located by 8 different individuals.[4] There are good indications that a sizeable number of claims may have been fraudulently

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2/ Cont'd.

ground to supply demand) exceeded consumption by as much as 11 to 24 times the annual consumption, and new discoveries of natural crude each year exceeded the annual consumption. In fact, new discoveries reached record highs in 1919, 1920, and 1921.

[3] The Mineral Leasing Act provided, among other things, for (1) rentals, royalties and bonuses in favor of the United States, (2) acreage limitations on the amount of land that could be held under lease, (3) the continuing control and supervision over the use and disposition of the surface of the lands by the Department of the Interior, and (4) the continuing control and supervision over the development of the mineral resources by the Interior Department. The act was a complete change from the philosphy of the mining laws that permitted (1) the unlimited location of mining claims simply by recording a location certificate in the county records, (2) the free use and occupation of the lands for mining purposes without any control or supervision, and (3) the acquisition of the complete fee title by the payment of $2.50 per acre for a placer claim if a mining claimant desired to obtain a patent rather than simply work the claim, exhaust the minerals, and abandon the land.

[4] Under the mining laws one individual can locate a mining claim covering 20 acres. However, with the addition of names up to a limit of eight, 20 acres can be added to placer mining claims for each name. The annual assessment work of $100 per claim and the required $500 worth of improvements remains the same whether the placer claim covers 20 acres or 160 acres.

located through the use of seven "dummies" or "strawmen" for the benefit of one individual or company. The location certificates generally recited[5/] that the claims had been properly located in compliance with the mining laws, i.e., among other things, that the boundaries had been determined and that a valuable mineral deposit had been found within the limits of the claim lines. The validity of such self-serving declarations can only be considered in the light of the available information which indicates (1) that a tremendous number of claims covering 160 acres of exceedingly rough mountainous terrain (in many instances the lands had not as yet been surveyed or had been incorrectly surveyed by the Government) were allegedly located in a period of one day, (2) that a good portion of the claims were allegedly located in the wintertime when it would have been a phenomenal feat to even gain access to the oil shale country let alone determine the boundaries of a claim and find oil shale exposed within the limits of such a claim, and (3) that a significant number of claims were probably located by simply filling out and recording location certificates on the basis of available maps without attempting to gain access to the oil shale lands, determining the boundaries of the claims, and finding what might be considered a valuable mineral deposit within the limits of each claim. The actual number of different individuals who participated in the location of oil shale claims (or more properly the recording of location certificates) was apparently relatively small in comparison with

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5/ There is no requirement that the locator of a mining claim apprise the Department of the Interior that rights are being asserted in the public lands. The locator simply records a location certificate in the local County Clerk and Recorder's Office.

the number of claims located. The names of 214 individuals listed on location certificates covering oil shale lands in Colorado appear on separate location certificates for 50 or more claims. The average number of claims purportedly located by each of these 214 individuals was 104. One of these individuals allegedly located 161 claims on January 1, 1919. At 160 acres per claim this would amount to 25,760 acres or in excess of 40 square miles of rough mountainous land.

The thousands of oil shale claims blanketed over millions of acres of public domain in the states of Colorado, Utah, and Wyoming prior to February 25, 1920, when the Mineral Leasing Act withdrew oil shale lands from the operation of the mining laws, were not located with the belief that the lands were at the time valuable for mining purposes, the obvious intent and purpose of the mining laws, but with the speculative hope that the lands or the stock of a newly formed corporation might be traded for a fast profit or that the lands might at some unknown time in the indefinite future be valuable for mining purposes. The oil shale was readily apparent throughout the country outcropping in cliff faces, was free for the taking by anyone, and no one was spending time and money in mining the oil shale and processing and placing the products therefrom in the market.

No one in their right mind could have held the belief that under any circumstances all of the oil shale lands covered by location certificates could have been valuable for mining purposes either as a present fact as of 1920 or within the foreseeable future. If there had been no technological and economic problems preventing the production of shale oil, and if shale oil could have completely supplanted natural petroleum and captured the entire market in the United States in 1920, then (1) eighty 160-acre mining claims covering mediocre deposits of oil shale could have supplied the total consumption of the United States for 1920, and (2) the estimated 55 plus billion barrels of potential shale oil in a portion of the Green River formation in Colorado could have supplied the total consumption of the United States in 1920 for over 100 years. This, of course, ignores the shale oil potential of the Green River formation in Utah and Wyoming and the shale oil potential of the other extensive deposits of widespread occurrence of oil shale throughout the United States and, in particular, the large eastern deposits that were receiving some attention in 1920.[6]

The major participants in the oil shale activity of the 1920 era were the individual speculators or promotors who hoped to make a fast dollar through the acquisition and disposition of interests in oil shale claims or through the sale of stock in newly formed oil shale corporations. In addition, there were a small number who showed some interest in acquiring oil shale lands as an insurance program or a hedge for the long-term future against a possible oil scarcity and a few who actually constructed experimental plants. It is difficult to ascertain whether the experimental operations were conducted by handyman tinkerers who had dreams of inventing a commercially feasible process that would convert the tremendous deposits of worthless oil shale into marketable products or by promotors seeking to impress investors that they were working on the only retort that promised to be successful.

6/ The above figures reach astronomical portions if the assumption is indulged in that inferior shale oil could have completely supplanted natural petroleum and could have captured the entire market in only the states of Colorado, Wyoming, Montana, and Utah.

It is extremely significant that the companies whose business and continued existence depended upon the production of petroleum and the sale of petroleum products paid little attention to the speculative fever generated by promotional activity surrounding oil shale lands in the 1920 era. For example, Union Oil Company of California was one of the few major oil companies that even bothered to look into oil shale and one of the still fewer companies that acquired oil shale lands as cheap insurance for the future. Cities Service Oil Company through a subsidiary located some oil shale claims in Wyoming through the use of employees' names and in the early 1920s lost all interest in oil shale and the unpatented claims as a future potential resource. Pure Oil Company purchased some oil shale claims in the early 1920s, and then in the late 1940s the company had to conduct a field investigation to find out where the claims were. Standard Oil of Indiana took options on oil shale claims in 1920 and, after concluding that if, in fact, an oil shortage developed, oil could be imported at a considerably smaller cost than attempting to process the oil shale of the Green River formation, dropped the options.

Almost immediately after the passage of the Mineral Leasing Act on February 25, 1920, the oil shale speculative bubble burst. In 1924 the assistant editor of Chemical and Metallurgical Engineering after a trip to the "shale fields" reported:

> . . . The special retort seemed to be a necessary accoutrement of every promotion, for the investor had to be shown that the company had perfected all of its plans even to controlling the only eduction method that promised to be successful on a commercial scale. The development of many of these processes ended in the drafting room, although a dozen or more demonstration units and

> larger-than-laboratory experimental plants were erected. A number of the latter are still standing in various parts of the country--almost forgotten relics of a promoter's dream, built, of course, with the stockholders' money.

* * *

> For most of these promotions the day of judgment was not long delayed. The general business depression of 1921 caused a tightening of public purse strings. Capital became wary of investments in new enterprises of any kind. Then as the final blow came southern California's flush production that completely turned the tables in the oil industry, bringing with it a period of overproduction and, later, a precipitous drop in oil prices. . . . (G-427)

Over production of natural crude oil continued in increasing proportions. The oil industry attempted to remedy the situation by shutting in producing wells and discouraging the discovery and development of new pools. Finally in the 1930s the Federal Government and certain State Governments took appropriate steps by way of legislation to curtail the production of oil and stabilize its price.

With the exception of a few who continued to have strong hopes for the far distant future, the locators and owners of oil shale claims and the promoters and speculators lost all interest in the oil shale lands of Colorado, Utah, and Wyoming. Beginning in the early 1920s and continuing over the ensuing years the pre-1920 oil shale claims lay dormant, serving only to create a cloud on the title to millions of acres of public domain. Examinations made by the General Land Office of the Department of the Interior between 1920 and 1930 to determine the status of oil shale placer mining claims in the area of the Green River formation in Colorado, Utah, and Wyoming disclosed "that more than 30,000 such claims, embracing more than 4,000,000 acres of the public domain, were not being maintained by the performance of annual assessment work." (G-112)

During the late 1920s and early 1930s the Department of the Interior challenged the validity of thousands of oil shale claims on the grounds that the claims were not being maintained by the performance of annual assessment work.[7/] The actions of the Department of the Interior went largely unheeded by the owners of mining claims. The mining claimants not only lacked sufficient interest in their mining claims to perform the annual assessment work but also made no attempt to assert the validity of their mining claims. The number of contest proceedings decided by default in favor of the Government can be inferred from the number of contests concluded in a single year. For the Fiscal Year ending June 30, 1931, the Secretary of the Interior reported that "during the year, 1,181 shale locations, embracing approximately 140,539 acres, were declared null and void." For Fiscal Year 1932, the Secretary reported that "locations numbering 10,918 for 1,294,500 acres were declared null and void." And for Fiscal Year 1933 the statement was made that "locations to the number of 11,146 for 1,448,980 acres were declared null and void." (G-111) During the three-year period 23,245 oil shale claims covering 2,884,019 acres of public domain were declared null and void.[8/]

[7/] The Mineral Leasing Act provided that oil shale and other nonmetalliferous minerals covered by the act could no longer be disposed of under the mining laws except in those instances where a mining claim was valid on the date of the act and was "thereafter maintained in compliance with the laws under which initiated." (30 U.S.C. 193)

[8/] In 1935 the Supreme Court in Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, ruled that the Department could not invalidate mining claims for a failure to perform annual assessment work. The thousands of assessment work decisions that had become final without any appeal proceedings within the Department prior to the Virginia-Colorado decision were subsequently ignored by employees of the Department of the Interior in determining

Shortly after World War II and as a direct result of Government research under the Synthetic Liquid Fuels Act of 1944 the interest in oil shale slowly began to revive. From the early 1950s to the present the interest has grown continually and in mushrooming proportions. The interest in and activity with respect to oil shale during the 1950s and the 1960s is somewhat reminiscent of the boom and bust period of the 1920 era. The individual speculators and promoters hoping to make a fast dollar through the acquisition and disposition of oil shale claims are again on the scene. One of the notable distinctions between the present and the 1920 era is the fact that oil companies whose business is the production of petroleum and the sale of petroleum products are now playing a major role in the acquisition of oil shale lands. Because of the intense interest in competitor activities in the petroleum industry the role of the oil companies in acquiring interests in oil shale lands has been somewhat of a self-generating or perpetual motion proposition. It is difficult to ascertain whether the acquisitions have been pursued because of the possible future value of oil shale as a substitute source of petroleum products or simply because of the activities of competitors in acquiring oil shale lands.

The interest and activity of most major oil companies with respect to oil shale from the early 1950s to the present is typified by the interest and activity of Shell Oil Company, one

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8/ Cont'd.

the validity of oil shale placer mining claims. The validity of the assessment work decisions is presently being asserted by the Government in court proceedings on the basis that the Department had jurisdiction to determine the validity of mining claims under which rights were being asserted in the public domain, and a subsequent finding by the court that the Department's construction of the law was erroneous did not affect the previous final decisions. However, because of a technical question concerning service of process the decisions if determined to be effective, may not have particularly far-reaching consequences.

of the parties to this proceeding.[9] Shell Oil Company first decided to acquire oil shale lands of the Green River formation in 1950. The decision was made because "owning shale oil reserves may have some value in political and financial quarters," (G-507, p. 56) and on the basis that tremendous reserves could be acquired as a cheap insurance program for the long-term future. In 1961 Shell's interest and activity was summarized as follows:

> For several years, Shell has refrained from taking any active part in research or other work on oil-shales or shale-oil, in the evident belief that there is little or no prospect of a profitable shale-oil industry being initiated in North America in the foreseeable future. From time to time, however, the subject of domestic oil-shales is reviewed, as a reassurance that the "hands off" policy continues to be justified. The last organized review of this nature was made in 1957 and it is now time to consider the subject again. (G-512, p. 4)

At the time of the hearing Shell's Executive Vice President in charge of Exploration and Production activity in the United States placed oil shale in proper perspective when he testified:

> 1. That oil from shale is analogous to gold in the ocean, and "the simple fact that there's a tremendous amount of gold in the ocean doesn't suddenly start people getting gold out of sea water" because "/i/t is what you can make out of getting that gold out of the sea water."[10] (Tr. 4858-4861)

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[9] The patent application covering the Mountain Boy claims was filed by Frank W. Winegar. Shell Oil Company was, however, the real party in interest inasmuch as the unpatented claims had been acquired in Winegar's name for the use and benefit of Shell. The Department of the Interior did not learn of Shell's interest in the claims until the contest proceedings were initiated.

[10] A comparison of oil from shale with gold from sea water has been made by others during the present era and also during the 1920 period. For example, R. M. Catlin, whose experimental operations on the oil shales of Nevada during the 1920 era far exceeded anything that was attempted in connection with the oil shale of the Green River formation, wrote on August 6, 1919:

> What is the use in publishing (what is very possibly a fact) that the Government estimates

> 2. If unknowns such as, for example, the question of depletion treatment and "what indeed might be the price of a barrel of shale oil" could be resolved, then investments might be made in research "to either enhance our pursuit of this business or decide that it was something we wouldn't get into." (Tr. 4868)

A small number of oil companies have since 1964 engaged in well-publicized research and development programs purportedly in an attempt to ascertain whether a company might be justified in the expenditure of labor and means in commencing a commercial oil shale operation with a reasonable prospect of success.[11/] This may or may not be the true purpose of such programs. In a memorandum dated August 28, 1963, the Denver Area Office of Shell sought approval to join in the reactivation of the Anvil Points facilities formerly operated by the Bureau of Mines under the Synthetic Liquid Fuels Act. The statement was made:

> This is basically a maneuver to keep the plant in neutral hands, to provide an additional avenue for keeping abreast of

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10/ Cont'd.

> the oil shales of Colorado, Utah, Nevada to contain fourteen times as much oil as man ever has taken from the oil wells. What of it, unless somebody finds a way to make it available. It is probably equally true that the waters of the sea contain over a thousand times more gold than man has ever found on the land, but also what of it, so long as nobody does anything. (G-724-J)

[11/] The test or standard for determining whether a valid discovery has been made on a mining claim, i.e., whether a valuable mineral deposit has been found, is whether a person of ordinary prudence would be justified in the further expenditure of his labor and means in actually working the property with a reasonable prospect of success in developing a valuable or paying mine. In other words, the test is simply whether the property is valuable for mining purposes. The test is not whether a person of ordinary prudence might be justified in the expenditure of time and money in an effort to ascertain whether the property might be valuable at sometime in the future for mining purposes.

> technical developments and to gain a certain amount of goodwill with Colorado officials in state and national governments." (G-513, p. 46)

The dormant pre-1920 oil shale claims that were plastered on a wholesale basis over the public domain have been revived, not because they have any present value for mining purposes, but because they have a speculative or prospective value as a result of the competition among oil companies to gain a position in oil shale or by reason of their potential value as a possible source of synthetic liquid fuel at sometime in the unknown future.

There is some indication that the oil shale speculative bubble of the 1960s may be approaching another burst. In 1964 the Colorado School of Mines was instrumental in initiating the first of a series of annual Oil Shale Symposiums.[11a/] The fifth annual Oil Shale Symposium was held in May of this year. The Rocky Mountain News on May 4, 1968, reported on the symposium as follows:[11b/]

> "Production of crude oil alone from shale probably can not now compete commercially with oil from wells.
>
> "However, increased demand for oil, decreasing production, and the stadily [sic] enchanced price will be met by an almost inexhaustible supply of oil shale, cheap mining, improved methods of distillation and valuable by-products, which will undoubtedly, in the very near future, make the oil shale industry a strong competitor for the oil well and, in the not too distant future, its successor."

[11a/] These annual symposiums, as with much of the oil shale story are a repetition of the 1920 era. Six national oil shale conferences were held each year from 1919 to 1924 as a convenient vehicle for promotional propaganda. With the collapse of the speculative bubble following 1920, the conferences went out of existence.

[11b/] The reports on the Symposium are not a part of the record in the present proceedings which was closed some six months ago. Nevertheless they fall within the spirit of the general understanding

> That statement, quoted by a speaker at Friday's session of the fifth annual Oil Shale Symposium in the Brown Palace Hotel, was made by the president of the Colorado School of Mines.
>
> Not the current president, Dr. Orlo Childs, however, but by the late Dr. Victor C. Alderson. It was made in April 1918.
>
> Now, a half-century later, commercial production of oil from shale still is being termed "just around the corner."
>
> From the conversation of at least a few of 350 attending the symposium, it is apparent, howevar, that commercial production of oil from shale may be another 50 years away.

And the Denver Post in its May 3, 1968 issue gave the following account of the fifth annual Oil Shale Symposium:

> In contrast to past symposiums where there were high hopes for an emerging multi-billion-dollar industry centered in the rich shale mountains of the Piceance Basin of western Colorado, many symposium leaders this year are pessimistic.
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> The view was expressed repeatedly in the symposium that unless prompt action is taken to encourage a viable oil shale industry, the nation will turn to another source for a synthetic fuels industry -- such as coal and tar sands.
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> * * *
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> The mood of the symposium was reflected in a comment by Dr. James H. Gary, head of the department of petroleum and chemical engineering of the Colorado School of Mines. The school, along with the Mines Research Foundation and American Institute of Mining, Metallurgical and Petroleum Engineers (AIME), is sponsoring the meeting.

11b/ Cont'd.

that any documentary evidence that was not prepared specifically for the contest could be submitted for appropriate consideration.

> "In past symposiums, there was a marked spirit of optimism and hope for a commercial breakthrough in oil shale," he said. "Now, the attitude borders on pessimism.
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> Raymond D. Sloan, manager of resource acquisitions of the Humble Oil and Refining Co., Houston, Tex., said:
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> "It's like an onion crop. If you don't pick it when it's ripe, it will spoil."
>
> Sloan said his company and other oil interests are turning more and more toward coal research for synthetic fuels.
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> * * *
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> Russell J. Cameron, Denver consulting engineer and oil shale expert, told a reporter that while government procrastination on leasing has retarded an oil shale industry, the oil interests also have been dragging their feet.
>
> He said the industry hasn't really put forth the effort it's capable of in development of commercial plants on lands outside of government control.
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> * * *
>
> Michel T. Halbouty, geologist and independent oil producer of Houston, Tex., who blasted government delays on leasing of lands and expressed doubt that an oil shale industry will ever get on the road, had this comment at the end of the Thursday session: [sic]
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> "Twenty-five years ago, we were told that oil from shale would be a reality in five years. Twenty years ago we were told it would be in five years.
>
> "And today we hear oil from shale will be a reality in the next five years. I'm beginning to doubt that it will ever be a reality."

In its May 5, 1968, issue the Denver Post commented further on the symposium:

> The blame for the admitted stalemate in getting a commercial oil shale development on the road was laid by most participants at the door of Interior Secretary Stewart L. Udall.

> The secretary was subjected throughout the symposium to a barrage of criticism from industry spokesmen and from others for continuing to lock up the fabulously rich oil shale reserves on public lands from private development.11c/

The history of the vast majority of oil shale claims can be aptly illustrated by considering a representative or typical group of claims. The Bute claims numbering 48 were allegedly located in December of 1919 and January of 1920.12/ The location certificates listed eight individuals, and presumably each of the claims covered 160 acres or a total of 7,600 acres (or 12 square miles) for the group. In 1921 the locators filed an instrument entitled "Notice in Lieu of Labor" claiming the benefits of a suspension of the requirement of annual assessment work on mining claims by Congress. No instruments were filed for record concerning the Bute claims between 1922 and 1954. In fact, the owners of the claims did not even bother to record notices in lieu of annual assessment work during subsequent periods of suspension by Congress. In 1954 an individual by the name of

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11c/ This is a fantastic allegation. The Government since 1920 has issued patents on some 2300 oil shale claims embracing more than 345,000 acres of land in Colorado, Utah, and Wyoming purportedly on the basis that the lands were valuable for mining purposes. The oil companies who have now blocked out and pocketed most of this acreage are as a whole of the opinion that their private holdings are more than sufficient to support a commercial-size oil shale operation. Nevertheless, it is continually asserted that oil shale cannot be developed until the oil companies can gain access to the richer and thicker oil shale deposits in the interior or central portion of the Piceance Creek Basin (an area that for unknown reasons was not plastered with pre-1920 oil shale claims).

12/ A portion of these claims are presently involved in a pending patent application. All of the Bute claims are involved in proceedings in which the validity of assessment work decisions rendered during the 1930s are being asserted.

Tell Ertl searched out two of the original locators and obtained quitclaim deeds for $100 each from the two individuals who had allegedly located the claims some 34 years previously. On the basis of the two-eighths interest obtained by the quitclaim deeds Tell Ertl allegedly performed $100 worth of annual assessment work on each of the 48 Bute claims. This was the only assessment work that had ever been done on the claims according to recorded documents. Mr. Ertl then published a notice in a weekly newspaper published in a small town near the claims calling upon the original locators or their successors in interest to contribute to the assessment work or forfeit their interests in the claims to Mr. Ertl. The forfeiture proceedings were allegedly conducted pursuant to 30 U.S.C. 28. At the time of the forfeiture proceedings some of the original locators were no longer living and their heirs who may have been spread throughout the country probably did not even know that they had inherited interests in dormant oil shale claims in Colorado. No one questioned or contributed to the assessment work and in 1956 Tell Ertl obtained a quiet title decree through proceedings in a local Colorado court finding that he was the owner of all of the interests in the Bute claims.13/ In 1964 sixteen of the unpatented Bute claims were sold by an individual who had obtained them from Tell Ertl for $1,536,000

13/ It would seem to be extremely difficult to establish that the pre-1920 oil shale claims had in fact been abandoned. It is not human nature to admit abandoning something that might have some value at sometime in the future. In addition, a good question exists as to whether abandonment could be shown by the thousands of heirs of original locators who in all probability did not even know that they had inherited an interest in dormant oil shale claims.

or approximately $600 per acre. Tell Frtl in 1954 by his ferreting out proceedings was able to obtain interests in the Bute claims on which to base his forfeiting out proceedings for about 3.9¢ per acre.[14] It is significant that after Tell Ertl had acquired the record title to the Bute locations by the alleged performance of annual assessment work for one year and the questionable forfeiture proceedings,no further annual assessment work (according to recorded documents) was performed for the benefit of the claims.

The first oil shale patent was issued by employees of the Department of the Interior in 1920. By instructions dated May 10, 1920, 47 L.D. 548, the First Assistant Secretary of the Interior advised the Commissioner of the General Land Office that deposits of oil shale "if valuable" are subject to location and purchase under the mining laws, and that applications for patent should be adjudicated "in accordance with the same legal provisions and with reference to the same requirements and limitations as are applicable to oil and gas placers."[15] Despite the consistent rulings of the Supreme Court and the Department of the Interior (1) that applications for mineral patents "should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact . . . which can only be known by development or exploration," (2) that "the mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral," (3) that "the amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the . . . /mineral/ is one which justified exploitation and working," and (4) that valuable mineral deposits are mineralization "of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end,"[16] employees of the General Land Office clearlisted and granted a patent on the first oil shale application that was filed. Subsequent patents covering oil shale claims were issued by employees of the General Land Office on a pro forma basis where the claims covered lands with the Mahogany Ledge exposed in the cliff faces.

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[14] Shell Oil Company recently entered into an agreement with Tell Ertl covering some 21,000 acres of unpatented oil shale claims, claims other than the Butes, whereby Shell would pay all costs of obtaining patents, including all costs of litigation and would have the option, if patents were obtained from the Government at a cost of $2.50 per acre, of purchasing the claims for $2,000 per acre, or something in excess of $42,000,000 for the entire group of claims.

[15] In 1921 the same First Assistant Secretary of the Interior noted:

> In the opinion of the Department, a discovery of oil in oil sands ordinarily means a well drilled to a sand which is capable of producing oil in commercial quantities. With respect to oil shale, a discovery would mean the uncovering or exposure of a deposit of oil shale in sufficient quantity and of sufficient value to warrant a person of ordinary prudence in the development and exploitation of the property for the purpose of producing oil and other by-products from the shales. (G-522)

A further departure from the basic requirements of the mining laws occurred in 1927. Previous to that time the Department had ruled on the basis of Supreme Court decisions and Departmental decisions that oil shale claims were not supported by valid discoveries of a valuable mineral deposit if the oil shale actually found on the claims was in the upper portion of the Green River formation hundreds of feet above the Mahogany Zone presumed to underlie the land at depth. These rulings were based (1) on the proposition that under the mining laws there must be an actual finding of the particular mineralization that impresses the land with value for mining purposes, and (2) the fact that the oil shale deposits found at the surface in the upper portion of the formation were not a part of or connected with the richer oil shale beds inferred to lie at depth, but were separate and distinct bodies of mineralization having no value whatsoever for mining purposes. One such decision, Freeman v. Summers (unpublished), was signed by First Assistant Secretary E. C. Finney in 1924. Subsequently, Mr. Finney granted a rehearing in the case. At the rehearing and at a special hearing before the Secretary of the Interior[17] the mining claimants adopted a new and completely opposite approach from that taken at the original hearing. At the original hearing it was recognized that the thin lean deposits found at the surface were of no value for mining purposes, and that the rich beds in the Mahogany Zone inferred to lie at depth would be mined by a 600-foot shaft. At the rehearings the contentions were advanced, contrary to the actual facts, that the Green River formation was one solid mass or deposit of like mineral, that the whole formation was valuable and would be mined and commercially developed, that a discovery of any oil shale at the surface, no matter how thin or lean, was a part of the integral mass and a part of the rich oil shale beds presumed to lie at

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[16] The quotations are from Davis v. Wiebbold, 139 U.S. 507 (1891); Iron Silver Mining Company v. Mike & Starr Gold and Silver Mining Company, 143 U.S. 394 (1892); Chrisman v. Miller, 197 U.S. 313 (1905), and Diamond Coal and Coke Company v. United States, 233 U.S. 236 (1914). These cases and others are covered in some detail in the following arguments.

17/ Summers, the homestead claimant, whose rights in the land under his homestead entry depended upon the invalidity of the mining claims did not attend the special hearing in Washington. In fact no one appeared in opposition to the oil shale placer mining claimants.

depth and was therefore a sufficient discovery of a valuable mineral deposit.[18/] After the second hearing and the special *ex parte* hearing before the Secretary a decision was written and approved by all necessary employees in the Department, except Mr. Finney, finding that the new contentions advanced were not supported by the facts and reaffirming Mr. Finney's previous 1924 decision. Mr. Finney then took it upon himself to write his own personal decision, *Freeman* v. *Summers*, 52 L.D. 201, in which he reversed his 1924 decision, subscribed to the preposterously false contentions advanced by the mining claimants, and found contrary to all applicable precedent that the thin worthless streaks of oil shale outcropping at the surface hundreds of feet above the rich oil shale presumed to lie at depth was a sufficient discovery of a valuable mineral deposit within the purview of the mining laws.

In addition to the application of erroneous geology and absurd mining concepts Mr. Finney's decision is also significant in that he concluded that as of 1927 the claims were supported by valid discoveries of a valuable mineral deposit inasmuch as oil shale at that time constituted a "valuable resource for future use by the American people." Nowhere else

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[18/] Under the state of geologic knowledge as it existed from prior to 1920 to the present the mining claimants were asserting the proposition that one would mine and process a 2-inch sliver of oil yielding material outcropping at the surface (and containing less oil than could be found over some 800,000 square miles of other sedimentary deposits in the United States), and then mine and process hundreds and hundreds of feet of barren beds of sandstone, siltstone, claystone, and other rock types before reaching the rich beds of interest in the Mahogany Zone presumed to underlie the lands at depth and which were readily apparent elsewhere outcropping in the cliff faces over a lineal distance of some 1700 miles.

in the entire field of mining law is there sound legal precedent for the proposition that a "valuable resource for future use" at some unknown indefinite time constitutes a valuable mineral deposit and supports a valid discovery under the mining laws. Mr. Finney's decision is even more astounding when one considers that by 1927 the speculative boom in oil shale had burst and the oil industry was taking drastic steps to shut in producing wells and discourage new discoveries and development.[19]

After 1927 oil shale claims were patented by employees of the Department of the Interior on an automatic basis. No consideration was given to the most fundamental requirements of the mining laws, i.e., whether the alleged locators actually went on the ground, determined the boundaries of the claims and found what was recognized as oil shale,[20] whether there had been fraud in the location of the claims through the use of "dummy" locators,[21] whether the claims had actually been abandoned by the original locators subsequent to the time of their location prior to 1920,[22] whether the lands were actually valuable for mining purposes in view of the fact that hundreds of thousands of acres of oil shale lands had been patented and no one had spent any time or even one cent of money in the actual development of the claims as mining properties and in the commercial extraction of the mineral therefrom, whether the absurd geology and mining concepts adopted by Mr. Finney in his Freeman v. Summers decision were actually supported by the facts, and whether a mining claim containing 1000 feet or so of worthless overburden lying above the presumed Mahogany Zone would ever be valuable for mining purposes in view of the extensive widespread occurrence of the Mahogany Ledge outcropping in the cliff faces elsewhere.

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[19] Mr. Finney's conclusion that oil shale was a valuable mineral deposit because at sometime in the unknown future it might possibly be valuable for mining purposes should be compared with other rulings that he subscribed to concerning the validity of mining claims and what constitutes a valuable mineral deposit within the meaning of the mining laws both prior and subsequent to his decision in Freeman v. Summers. In 1926 Mr. Finney signed a decision, United States v. Bullington, 51 L.D. 604, which stated:

> . . . neither of the claims . . . is, from a practical point of view, of any value for mining purposes.
>
> * * *
>
> The Department is clearly of opinion that the gold values in gravel existing on the claims could not be worked at a cost which would warrant mining operation.

Again in 1931 Mr. Finney issued an opinion, 53 I.D. 491, which stated:

> These conditions /mining costs/ are, manifestly, very material factors for a reasonably prudent person to consider in determining whether the minerals will justify the expenditure and time in the hope of developing a paying mine.

From the time of the first oil shale patent in 1920 to 1960 (when the process was brought to a halt) some 2300 oil shale claims were patented under the mining laws covering in excess of 345,000 acres in the states of Colorado, Utah, and Wyoming. The lands were patented presumably on the basis that they were valuable for mining purposes. However, after approximately a half a century no one has as yet demonstrated that oil shale lands have any value other than as a possible source of synthetic liquid fuels at some unknown indefinite time in the future. Oil shale as such has never had any value from the standpoint that it was useful or precious. While oil shale lands have at times had a speculative value from the standpoint of exchange, the oil shale as such has never had any value from the standpoint of use. The immense quantities of oil shale in the Green River formation, which are readily observable and have been free for the taking by any one, have never been used or marketed for any purpose other than in isolated instances in connection with modest research and experimentation calculated to determine whether the oil shale might in fact have some value at sometime for mining purposes.

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[20] Claims have actually been patented on the basis of oil shale found in drill holes drilled 30 years after the lands were withdrawn by the Mineral Leasing Act. The Mineral Leasing Act required either a pre-existing discovery or a discovery resulting from the diligent prosecution of work in progress on the date of the act.

[21] One group of oil shale claims were patented in the 1950s even though the claims had been declared null and void by a final decision of the Secretary in the 1930s for fraud in the location of the claims.

[22] In the late 1920s the owner of a group of claims quitclaimed and relinquished the claims to the United States. Nevertheless, in the 1950s the claims were patented.

In April of 1964 the Secretary of the Interior issued instructions to the Bureau of Land Management to initiate contest proceedings to test the adequacy of the discovery on which oil shale claims were based and to assert any other ground for contest which might be justified by the facts. The purpose of the instructions was to determine, after a full and complete development of the facts, the validity or invalidity of the thousands of remaining oil shale claims that had been plastered over the public domain prior to February 25, 1920, in the states of Colorado, Utah, and Wyoming.

The Bureau of Land Management did not choose or select the claims that would be contested in the initial proceedings. At the time of the Secretary's instructions there were only two patent applications pending before the local office of the Bureau of Land Management. Other patent applications involving over 250 oil shale claims were pending within the Department; however, these patent applications were the subject of appeals questioning the validity of decisions by the Land Office Manager rejecting the patent applications on the grounds that the claims were no longer in existence having previously been declared invalid during the 1930s for failure to perform annual assessment work. Accordingly, the claims in the two patent applications pending in the local office of the Bureau, which were not involved in appeals from rejections of patent applications, were made the basis of contest proceedings. In addition, three oil shale claims that remained for disposition within the Naval Oil Shale Reserves were included in contest proceedings.

In other words, the Bureau did not make a selection of claims that would be likely to present oil shale in an unfavorable light, but simply took the claims involved in pending applications before the local land office, and to satisfy previous commitments to the Navy the three remaining unpatented claims within the Naval Reserves in Colorado.

Contests were initiated in September of 1964 challenging the validity of the six Schuyler and Shoup claims, which were involved in a pending patent application filed by D. A. Shale, Inc.; the three Mountain Boy claims, which were involved in a pending patent application filed by Frank W. Winegar--it later developed that Shell Oil Company was the real party in interest behind Winegar's patent application; and three Hoffman claims within the Naval Reserve allegedly owned in part by Union Oil Company of California and others.

After the initial prehearing conference and for some unexplained reasons Union Oil Company and the others relinquished and quitclaimed the three Hoffman claims to the United States. This action resulted in the dismissal of the contests against the Hoffman claims.

The present proceeding is not like the usual mining contest where the particular mining claims involved have their own peculiar attributes and where rulings on the issues presented have limited application to the particular claims under consideration. For the most part, all pre-1920 oil shale claims are, under most of the issues presented in this proceeding, practically identical, and the determinations that will be made could well have far-reaching consequences on the thousands of remaining unpatented oil shale claims plastered over the public domain. Accordingly, it would seem that the rulings made in this proceeding should be based not only on a consideration of the particular claims being contested, but with full consideration of oil shale claims generally and a recognition of the effect of the rulings on all remaining unpatented oil shale claims.

Summary of Argument

The principal issues raised by the Contestant can be broadly stated as follows:

1. Whether there was a valid discovery of oil shale within the limits of any of the mining claims on or before February 25, 1920.
2. Whether, if a valid timely discovery was made with respect to any of the mining claims, the discovery could have been or has been lost and in such event the legal consequences.
3. Whether, if a valid timely discovery was made with respect to any of the mining claims, and if the lands did not subsequently revert to the public domain as a result of

a loss of discovery, any of the mining claims are at the present time supported by a valid discovery.

These broad issues and others that have been raised by the Contestant are considered in 15 separate arguments.

The first argument involves the questions of whether there was a timely finding of mineralization within the limits of each of the contested claims, what mineralization was found, and when it was found. In order to meet the first requirement of the mining laws there must have been an actual physical finding of oil shale within the limits of each of the claims, and under the terms of the Mineral Leasing Act the finding must have been made on or before February 25, 1920, or as a result of diligent prosecution of work in progress on that date. There is no competent evidence showing that the locators actually went on the lands, surveyed or otherwise determined the boundaries of each of the claims, and made a timely finding of what was recognized as oil shale within the limits of each of the claims. Accordingly, the principal point raised by this argument is whether the threshold requirement of the mining laws can be satisfied by inferences or presumptions rather than by facts if the Government does not assume the burden of proving the negative of a proposition that rests exclusively within the knowledge of the patent applicants or their predecessors in interest. Implicit in this point is the question of whether the people of the United States can be divested of their title to thousands or even millions of acres of oil shale lands covered by pre-1920 oil shale locations simply because it is now difficult or impossible to ascertain whether the locators almost a half a century earlier complied with the initial requirement of the mining laws. The mining laws provide that one who "has complied with the terms of this act, may file in the proper land office an application for a patent, under oath, showing such compliance" (30 U.S.C. 29). It is inconceivable, as a general proposition and particularly in view of the foregoing requirement of the mining laws, that the Government, almost 50 years after oil shale claims were allegedly located, should have to bear the burden of establishing that the locators did not go on the lands or did not make a timely finding of what was recognized as oil shale within the limits of each of the claims or suffer the consequences of having to issue a patent. The mining claimants have seen fit to wait all of these years before attempting to obtain a mineral patent for lands allegedly valuable throughout the entire period of time for mining purposes, and they and not the people of the United States, who are the beneficiaries of the public domain, should suffer the consequences of the delay in seeking patents.

The second argument raises the question of where within the limits of each of the contested claims the locators allegedly made a timely finding of oil shale. There is absolutely no evidence showing the point or the place of the alleged discovery within the limits of each of the contested claims. The principal point here is that the Secretary of the Interior cannot properly exercise his duties and responsibilities "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved" (Cameron v. United States, 252 U.S. 450), if he is not entitled to a showing as to what was found within the limits of a mining claim and the precise point or place where the alleged mineralization was found. The Secretary of the Interior must be given sufficient information to evaluate and confirm the alleged compliance with the requirements of the mining laws. It is unbelievable that the question of whether a timely valid discovery of oil shale was made within the limits of each of the claims can be resolved in favor of the Contestees who are asserting the validity of the claims, and seeking to obtain patents based upon an alleged compliance with all requirements of the mining laws, without knowing what was found (if anything was in fact found) within the limits of each of the claims and the precise point or place where the alleged mineralization was found.

If it is presumed or inferred that there was a timely finding of oil shale within the limits of each of the contested claims, and if it is concluded that there has been full compliance with the threshold requirement of the mining laws without establishing the point or place of the alleged discovery, then the third argument raises questions as to whether there was an actual physical finding of a valuable mineral deposit (as distinguished from the mere finding of some mineralization) within the limits of each of the claims as required by the mining laws. This argument is concerned only with the question of whether any oil shale that might be presumed to have been timely found within the boundaries of each of the claims constituted a valuable mineral deposit within the purview of the mining laws. This argument is premised on the proposition (which the Contestant disagrees with and which is treated in later arguments) that the rich beds of oil shale within the Mahogany Ledge or Zone, and specifically the Mahogany Bed, might have constituted valuable mineral deposits sufficient to support a valid discovery if actually timely found, and if sufficient prospecting work had been done to arrive at a determination as to the nature and the extent of the mineralization that had been found. Three separate points are raised in this argument:

1. Any oil shale that might be inferred to have been timely found was absolutely worthless, was not the particular mineralization that might have impressed the land with value for mining purposes, and was not a part of or connected with the rich oil shale beds in the Mahogany Ledge or Zone presumed to lie hundreds of feet beneath the surface of the claims that might have impressed the land with value for mining purposes. This point adopts the law as announced in both the first and the second decisions in Freeman v. Summers, the facts as found in the first decision, and attacks the preposterous factual contentions advanced and accepted by Mr. Finney in the second Freeman v. Summers decision.

2. If it is concluded that any oil shale outcropping at the surface within the limits of the claims was a part of or connected with the rich oil shale of the Mahogany Ledge or Zone that might lie at depth beneath the surface of the claims, there was still no finding of a valuable mineral deposit within the purview of the mining laws. Until the richer mineral values supposed to exist at depth had actually been found by exploration or prospecting, the initial step in perfecting a discovery of a valuable mineral deposit within the purview of the mining laws had not been accomplished.

3. If it is concluded that the particular mineralization that might be inferred to have been found might have constituted in itself a valuable mineral deposit, and that the initial step in perfecting a discovery of a valuable

mineral deposit had been accomplished, i.e., the actual finding of mineral values that might impress the land with value for mining purposes, there was still no finding of a valuable mineral deposit within the meaning of the mining laws. The succeeding steps necessary to determine what in fact might have been found and to perfect a discovery of a valuable mineral deposit were not accomplished. Until sufficient prospecting or exploration work had been done to ascertain the quantity and quality of the mineralization, and to determine other factors, such as its continuity and lateral extent, that would influence a decision as to whether the particular mineralization within the particular mining claim warranted exploitation and the development of the claim with a reasonable prospect of success in developing a valuable or paying mine, a valuable mineral deposit within the meaning of the mining laws had not been found.

There is absolutely no evidence that the locators of the claims (or for that matter any one up to and including the present patent applicants, with the exception of the Bureau of Land Management) made any attempt by prospecting or exploration to ascertain whether any mineralization that might be inferred to have been found was in fact a valuable mineral deposit. If it is presumed that the locators did sufficient prospecting or exploration work to enable them to reach a decision as to the nature and extent of the mineralization that might exist within the limits of each of the contested claims, or if it is concluded that such work was not necessary under the mining laws, then the fourth argument raises the question as to whether any oil shale that might be presumed to have been found or that might exist within the limits of the claims (including the rich oil shale beds of the Mahogany Ledge or Zone and the Mahogany Bed) constituted a valuable mineral deposit within the purview of the mining laws as of February 25, 1920. This argument is based on the proposition that a valuable mineral deposit as the term is used in the mining laws, is an occurrence of mineral of such quantity, of such quality, and in such situation as to justify a person of ordinary prudence in the immediate expenditure of his labor and means in actually working the property and exploiting the mineral with a reasonable prospect of success in developing a valuable or paying mine. In other words, the mineral deposit must have a present value for mining purposes. This argument raises two points:

1. An occurrence of mineral such as oil shale that might possibly at some indefinite unknown time in the future justify a person of ordinary prudence in the further expenditure of his labor and means in working the property and exploiting the mineral with a reasonable prospect of financial success is not a valuable mineral deposit within the meaning of the mining laws. The mining laws speak only in terms of presently valuable mineral deposits and not in terms of a mineral deposit that might at sometime in the unknown future become valuable. Congress certainly did not intend to facilitate the stockpiling of the public domain by speculators hopeful that some future event might render a currently valueless mineral deposit valuable.

2. Even assuming (contrary to the actual facts) that the actions of the few misguided individuals who actually constructed experimental plants (probably in an effort to exploit the public through stock promotions rather than to

> exploit the oil shale), were representative of the actions of a person of ordinary prudence, and that a person of ordinary prudence would have been justified in the expenditure of labor and means in research and experimentation in an effort to ascertain whether the worthless oil shale might possibly be converted to a valuable mineral deposit and thereby justify the actual working of the property and the exploitation of the mineral with a reasonable prospect of financial success, this factor would still not be sufficient to show that a valuable mineral deposit within the purview of the mining laws had been found. The mining laws require the finding of a presently valuable mineral deposit. They do not cover worthless deposits of mineralization that may or may not be found to be valuable at sometime in the future as a result of research and experimentation. The test or standard is not whether a person of ordinary prudence might be justified in spending time and money in an attempt to ascertain whether a valuable mineral deposit might be found, but whether in fact a valuable mineral deposit has been found.

This argument is a direct attack on the conclusions of Mr. Finney in *Freeman* v. *Summers* that an occurrence of mineral that has no present value for mining purposes and might never have any value for mining purposes is nevertheless a valuable mineral deposit within the purview of the mining laws if it is a "valuable resource for future use by the American people" at some indefinite unknown time in the future.

If it is concluded that an oil shale placer mining claim could have been supported by a valid discovery of a valuable mineral deposit as of February 25, 1920, under any theory short of the proposition that oil shale or the products from oil shale might possibly be marketed at some indefinite unknown time in the future, then the fifth argument raises the question as to whether all of the thousands of oil shale claims blanketed over the public domain could be considered as valid oil shale claims as of 1920 or only the few that might possibly have been subject to development either immediately or within the reasonably foreseeable future. In view of the tremendous quantities of oil shale presumed to underlie the area of the Green River formation, and the fact that only a few of the thousands of oil shale claims plastered over the public domain could under any conceivable circumstances have supplied any actual or supposed deficiency in the supply of petroleum or petroleum products for the reasonably foreseeable future, it seems beyond all reason to recognize that the entire area could be acquired under the mining laws for mining purposes when the greater portion of the area would have no value for mining purposes for an unknown time in the future or, even more significantly, when the major portion of the area might never have any value for mining purposes because of subsequent occurring events. If there was such a thing as a valid oil shale claim as of February 25, 1920, this argument presents the question of whether the contested claims can be considered as having been valid in the absence of any evidence showing that for one reason or another the particular claims were among the few that might possibly have been considered as valuable for mining purposes. An affirmative answer would mean that the people of the United States could be divested of their title to a good portion of the oil shale lands of Colorado, Utah, and Wyoming on the basis of hypothetical and speculative evidence that would be applicable to any of the thousands of oil shale claims blanketed over the public domain.

The sixth argument raises the question of whether at this time the validity of the contested claims as of February 25, 1920, should be determined on the basis of past assumptions, hopes, or beliefs, or on the basis of presently known facts. There is a significant distinction between recognizing the validity of a mining claim for which patent is applied for in 1920 based, for example, upon assumptions, hopes, or beliefs that in the immediate future the material within the claim might be extracted and placed in the market, and recognizing the validity of a mining claim for which patent is applied for in 1960 based upon 1920 assumptions that were almost immediately proved to be erroneous. Certainly a mining claimant should assume the risk that if and when he applies for patent any assumptions that might possibly at one time have been indulged in may no longer be applicable by reason of subsequent factual developments.

If it is determined that any of the contested claims were valid existing mining claims supported by a proper discovery of a valuable mineral deposit at the time of the withdrawal accomplished by the Mineral Leasing Act of February 25, 1920, then the seventh argument raises the question of whether any such mining claims can be recognized as valid today (and whether the Contestees are entitled to obtain patents) if the claims were not valid existing mining claims supported by proper discoveries at the time of other withdrawals during the 1930s that also operated to remove the lands from acquisition under the mining laws. The 1930 withdrawals excepted from their operation only lands subject to then valid existing rights. Inasmuch as the contested claims (or for that matter all pre-1920 oil shale claims) were not valid existing claims supported by sufficient discoveries at the time of the 1930 withdrawals, the withdrawals automatically attached and restored the lands to the unappropriated public domain. This argument is simply the logical extension of other arguments that the contested claims must have been supported by valid discoveries as of the date of the Mineral Leasing Act when the lands were originally withdrawn from the operation of the mining laws.

The eighth argument raises the question as to whether the contested claims (and all pre-1920 oil shale claims) can, in any event, be recognized as valid today inasmuch as any valid timely discoveries that might have been made were subsequently lost resulting in a loss of the locations. This argument is premised on the fact that there was a significant period of time subsequent to February 25, 1920, when the contested claims were not supported by valid subsisting discoveries and as a result there was a loss of the discoveries with a consequent loss of the locations. Because of the continuing operation of the 1920 withdrawal by Congress and a 1930 withdrawal by the President the claims could not be revived and cannot be recognized as valid existing claims today.

If it is determined that a valid timely discovery was made with respect to any of the contested claims, and if it is further determined that the lands did not subsequently revert to the public domain as a result of a loss of the discovery, then the ninth through twelfth arguments present questions as to whether any of the contested claims are supported by a valid discovery of a valuable mineral deposit at the present time, i.e., from the filing of the patent applications to the time of the hearing.

The ninth argument asserts that the K. C. Schuyler No. 2 claim cannot be recognized as a valid subsisting claim today, and a patent cannot be obtained, inasmuch as there is no competent evidence showing that the claim is presently supported by a valid discovery, i.e., that there was an actual physical finding of oil shale within the limits of the claim at the time the patent application was filed and at the time of the hearing. This argument is similar to the first argument. It is, however, limited to the K. C. Schuyler No. 2 claim inasmuch as oil shale can at the present time be found outcropping at the surface within the limits of each of the other contested claims.

The tenth argument raises the question as to whether any of the contested claims can be recognized as valid today (even if it is inferred or presumed that oil shale was found at some unknown point within the limits of each of the claims prior to February 25. 1920) in the absence of any evidence showing that the patent applicants found the particular oil shale that was the basis for the alleged discovery prior to February 25, 1920.[23] The point here is that a valid discovery could not have been made subsequent to the time of the withdrawal accomplished by the Mineral Leasing Act, and in the absence of some evidence showing that any oil shale found by the present patent applicants was in fact the particular oil shale that was allegedly found prior to February 25, 1920, there is absolutely no way of determining whether the claims are presently supported by a timely discovery made prior to February 25, 1920, or whether the claims are presently supported by a discovery made scores of years after the lands were withdrawn from acquisition under the mining laws. It is inconceivable that the requirements of the mining laws can be met by inferring that oil shale was timely found within the limits of each of the claims and then inferring that any oil shale found by the present patent applicants was in fact the oil shale inferred to have been found prior to February 25, 1920.

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[23] The Contestees have asserted that the alleged discovery was made prior to February 25, 1920, and not as a result of the diligent prosecution of work in progress on February 25, 1920.

The eleventh argument is similar to the third argument relating to the question of whether there was an actual physical finding of a valuable mineral deposit (as distinguished from the mere finding of some oil shale) within the limits of each of the contested claims prior to February 25, 1920. The question here, however, is whether there was an actual physical finding prior to February 25, 1920, of what would today be considered the particular mineralization that might impress the land with value for mining purposes. A mining claim cannot be supported by a present valid discovery made by finding a presently valuable mineral deposit scores of years after the lands have been withdrawn from location and acquisition under the mining laws. Where withdrawals intervene after the location of a mining claim, the claim can only be supported by a discovery made by finding prior to the time of the intervening withdrawals what would presently be considered a valuable mineral deposit. This argument raises the same three points that are considered in the third argument; however, since the question here is whether the claims are supported by a present valid discovery of a valuable mineral deposit found prior to February 25, 1920, the points are considered with reference to the present state of knowledge, and what might be presumed or inferred to have been found prior to February 25, 1920.[24] This argument is also premised on the proposition that the rich beds of oil shale within the Mahogany Ledge or Zone might constitute valuable mineral deposits today sufficient to support a valid discovery if actually timely found and if sufficient prospecting work had been done to arrive at a determination as to the nature and the extent of the mineralization that had been found.

The *twelfth argument* is similar to the fourth argument and raises the question of whether any oil shale that might be presumed to have been found or that might exist within the limits of the claims constitutes a valuable mineral deposit within the purview of the mining laws today. This argument, as with the fourth argument, is based on the proposition that a valuable mineral deposit, as the term is used in the mining laws, is an occurrence of mineral of such quantity, of such quality, and in such situation that it has a present value for mining purposes.

If it is determined that a valid timely discovery was made with respect to any of the contested claims, that the lands did not subsequently revert to the public domain as a result of the loss of the discovery, and that any of the contested claims are supported by a valid discovery of a valuable mineral deposit at the present time, then the thirteenth through fifteenth arguments present questions as to whether in any event certain of the contested claims and portions of the contested claims can be considered as valid subsisting claims today sufficient to support the issuance of patents.

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[24] Insofar as the facts are concerned, it makes no difference, with the possible exception of the K. C. Schuyler No. 3 claim, whether the test of a present valid discovery is determined on the basis of what might be presumed to have been found within the limits of each of the contested claims prior to February 25, 1920, or on the basis of what has been found subsequent to the time of the withdrawal and up to the time of the hearing. With the exception of the one core hole drilled by the Government in connection with the contest proceedings which encountered the Mahogany Zone at depth beneath the surface of the K. C. Schuyler No. 3 claim, no work has been done on any of the claims since their location almost 50 years ago that would result in finding anything that could not be presumed to have been found outcropping at the surface by the locators if they actually went on the lend and determined the boundaries of the claims.

The thirteenth argument asserts that in any event the contested claims can only be valid as to 20 acres surrounding the alleged point or place of the alleged discovery. This argument is based on (1) the proposition that if an association placer mining claim is conveyed to a single person prior to discovery, a subsequent discovery will perfect the claim only as to 20 acres surrounding the discovery, and (2) the fact that the claims (and a great majority of the pre-1920 oil shale claims) were conveyed to one individual prior to February 25, 1920. The Contestees have stated that oil shale was discovered prior to February 25, 1920, but the exact date or dates are unknown Again, the real question here is whether the beneficiaries of the public domain can be divested of their interests not by any factual showing of a compliance with the requirements of the mining laws, but on the basis of presumptions or inferences that oil shale was timely found within the limits of each of the claims and that it was found prior to the conveyance of the claims to one individual.

The fourteenth argument raises the question as to whether certain 10-acre tracts within the Harold Shoup No. 3 claim must be eliminated from the claim and any patent that might issue on the grounds that they are nonmineral lands and not subject to disposition under the mining laws. This particular claim (as with a good number of the pre-1920 locations) includes lands lying in the lower portions of the Green River formation where the rich oil shale beds of the Mahogany Ledge or Zone have been eroded from the lands. Any oil shale that might be found within these lands is insignificant from the standpoint of the thickness of the beds and the oil yielding content of the shale. It is inconceivable that any one could consider such deposits as having any value either presently or prospectively for mining purposes.

The fifteenth argument is the only argument that is applicable solely to the contested claims and that is not of any consequence insofar as pre-1920 oil shale locations generally are concerned. The Contestant asserts in this argument that, as a result of the action of the owners of the Schuyler and Shoup claims in changing the boundaries of each of the claims in 1923 and the subsequent actions of the mining claimants, each claim is null and void as to all lands excluded from the claim by location certificates filed in 1923. In addition, it is asserted that certain of the Schuyler and Shoup claims are null and void in their entirety inasmuch as the alleged points of discovery were purportedly within the lands excluded from the claims. The loss of the discovery was a loss of the locations.

The Contestees have raised two issues which actually have no bearing on the questions of whether the contested claims are valid existing mining claims and whether the Contestees are at this time entitled to obtain patents by reason of full compliance with the requirements of the mining laws. These issues are:

1. Whether the Government is applying or seeking to apply standards of discovery as to oil shale claims at variance with those enunciated in Freeman v. Summers or

with those applied generally in past adjudications and, if so, whether the Government is precluded from so doing.

2. The legal effect of prior proceedings, if any, involving the mining claims or any of them.

The sixteenth argument considers the question of whether the United States is estopped from considering the validity of oil shale placer mining claims on the basis of the requirements of the mining laws simply because employees of the Department of the Interior have in the past consistently patented oil shale claims without any consideration of even the most elemental requirements of the mining laws. The point here is that the Contestees' estoppel theory comes into operation only if it is first determined that the contested claims are invalid under one or more of the issues raised by the Contestant. If the contested claims meet all of the requirements of the mining laws, they are, without considering anything more, valid existing claims, and the Contestees are entitled to patent. Under such circumstances there is no need or reason to consider the past practices of employees of the Department in clearlisting and patenting oil shale claims. However, if the contested claims do not meet the requirements of the mining laws, then the question of whether the United States is precluded or estopped from applying standards at variance with past practices becomes significant. The Contestees' estoppel theory boils down to the proposition that if oil shale claims are invalid for one or more reasons, they nevertheless cannot be considered as invalid today because of the past practices of employees of the Department of the Interior in disregarding the requirements of the mining laws. Under this novel doctrine the Interior Department and all Secretaries of the Interior would be bound to perpetuate and could not change any erroneous practices of the past in passing upon the validity of rights claimed in the public domain. The validity of mining claims and other rights asserted in the public domain would be determined, not on the basis of compliance with the law but on the basis of past erroneous actions of employees of the Department of the Interior. Under such circumstances an incumbent Secretary of the Interior could not manage the public domain as charged by Congress, but could serve only as a vehicle for the continued improper disposition of the public lands.

The seventeenth argument considers the question of whether the United States is now estopped from considering the validity of the contested claims by reason of past actions of employees of the Department of the Interior with respect to the specific contested claims. The short answer to this question is that the United States cannot be estopped by actions of its employees, and so long as the land remains unpatented and within the jurisdiction of the Department of the Interior the Secretary has not only the authority but the duty to exercise his responsibility as guardian of the public domain "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." (Cameron v. United States, 252 U.S. 450)

Conclusion

If the contested claims (and all of the thousands of remaining unpatented oil shale claims) meet all of the requirements of the mining laws, then, of course, the mining claimants are entitled to obtain patents from the United States at a cost of $2.50 per acre, and the fact that the lands may be worth hundreds or even a thousand times that amount does not preclude the issuance of patents. However, if the contested claims (and all of the remaining unpatented oil shale claims) do not meet the requirements of the mining laws, then the people of the United States, the beneficiaries of the public domain, are entitled to obtain a clear title to that portion of the public domain plastered with pre-1920 oil shale claims, and the fact that in the past employees of the Department of the Interior may have acted as agents for relinquishing rather than preserving the rights of the United States in the oil shale lands cannot preclude the rights of the United States and the public as a whole in the oil shale lands of Colorado, Utah, and Wyoming.

FAXGRAM TO SOLICITOR'S OFFICE, WASHINGTON, D.C.: 2-343-2192
ATTENTION: Larry McBride

United States Department of the Interior
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DENVER REGION
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225

February 12, 1979

Memorandum

To: Associate Solicitor, Division of Energy and Resources

From: Regional Solicitor, Denver

Subject: Recommendation to petition the Supreme Court for a writ of certiorari to the Court of Appeals for the Tenth Circuit in Shell Oil Co. v. Andrus, Civ. No. 77-1346 (filed January 25, 1979)

Enclosed you will find our preliminary recommendation that you urge the Department of Justice to seek review of the Court of Appeals' decision in the above-captioned case. That Court held that Congress had approved the Department's earlier departure from the mining law as regardsthe patenting of oil shale claims. Thus, the Department may not now overrule what it regards as a clearly erroneous practice.

That decision, if allowed to stand, may eventually result in the disposition of title to approximately six million acres of public lands to various large oil companies. As the Court of Appeals' decision is clearly erroneous as to both findings of fact and findings of law, we urge you to recommend to the Department of Justice that it seek review in the Supreme Court.

A more detailed analysis of the Court of Appeals' decision and our recommendations will be forwarded to you as soon as possible.

Albert V. Witham
Acting Regional Solicitor

Enclosure

Should patents issue for oil shale mining claims under a different legal standard than for all other mining claims located pursuant to the same law, the general mining law, 30 U.S.C. §§ 22 *et seq.* (1976)? The Court of Appeals for the Tenth Circuit recently held just that. *Shell Oil Co. v. Andrus*, Civ. No. 77-1346 (filed January 25, 1979). That Court's entire opinion rests on one basis -- legislative ratification of administrative practice. The Court held that the Department of the Interior could not change its own administrative practice, whether erroneous or not, due to "affirmative action" by Congress to approve that practice.

The decision of the Court of Appeals should be overruled for several cogent reasons. First, it will force the United States to patent some 5,000,000 to 6,000,000[*] acres of land in Colorado, Utah and Wyoming on a legal basis completely contrary to the mining law. The decision does violence to the Supreme Court's own holdings in every case dealing with the "discovery" issue. *United States* v. *Coleman*, 390 U.S. 599 (1968); *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron* v. *United States*, 252 U.S. 450 (1920); *Cole* v. *Ralph*, 252 U.S. 286 (1920); *Chrisman* v. *Miller*, 197 U.S. 313 (1905).

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[*] Reliable statistics for the number of acres are not readily available. However, several studies have been done from which an estimate can be extrapolated which is accurate plus or minus two million acres. The Government's Post Hearing Brief and Appendix discusses several exhibits prepared for this proceeding to determine the number of claims in this area. Appendix at 922; Exs. G-60, 107, 109; Tr. 573-574, 917-932, 2587-2633. Of 1,032,638 acres located in the study area, a fair number were "top-filed" on other claims. The actual area embraced by all the claims was 671,000 acres. Appendix at 923. In other words, due to duplication of claims and other reasons, approximately the number of acres claimed was 1/3 larger than actually existed in the area.

In a later study done by the Bureau of Land Management, 55,993 claims were identified as located in the oil shale areas of Colorado, Utah and Wyoming. Assuming 160 acres per claim results in 8,958,880 acres being claimed. Weeding out 1/3 due to duplication, location for other minerals, and other infirmities yields nearly 6,000,000 acres.

Second, the decision of the Court of Appeals on the issue of legislative ratification is contrary to all of the Supreme Court's holdings on that issue, and particularly contrary to three cases decided in the last term. *Securities and Exchange Commission* v. *Sloan*, ____ U.S. ____, 56 L.Ed.2d 148 (1978); *Tennessee Valley Authority* v. *Hill*, ____ U.S. ____, 57 L.Ed.2d 117 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978).

Third, there is now a split between the Courts of Appeals for the Ninth and Tenth Circuits on the applicability of the "discovery" standard to all minerals. Compare the decision in question with *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969), where the Court of Appeals for the Ninth Circuit stated: "We think it clear that the marketability test is applicable to *all* mining claims." 399 F.2d at 621.

Fourth, quite apart from the legal standards applied by the Court of Appeals, its findings of fact are clearly erroneous: 1) as to the marketability of oil shale, 2) as to the sequence and timing of certain events, and 3) as to legislative involvement in oil shale policy.

I. STATEMENT OF FACTS

All of the mining claims in question were located before February 25, 1920. Until that time, placer mining claims could be located for oil, gas, oil shale, and certain other substances pursuant to the general mining law, and the claimant could receive title to both the mineral deposit and the land in which the deposit was found. 30 U.S.C. § 22 *et seq.* (1976). But to receive title, the claimant had to prove that he had discovered a "valuable mineral deposit." Act of May 10, 1872, 30 U.S.C. § 22 (1976). Soon after enactment of the general mining law, the Department adopted what is generally referred to as the "prudent man test" in order to determine whether a mineral deposit is "valuable."

> "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

Castle v. *Womble*, 19 L.D. 455, 457 (1894).

Stated in other terms, while a person does not have to have a mine actually operating at a profit on his claims, he must be able to prove that he could have, as a present fact. The reason for requiring "present marketability" developed due to conflicting claims between homesteaders and mining claimants and conflicting claims between lode mining claimants and placer mining claimants. It would be nonsensical to allow a mining claimant to defeat a homestead entry on the basis that minerals in the land might someday be valuable due to changes in technology or market price. Moreover, it would encourage the one thing that has always been abhorrent to the Congress -- private speculative gains at the expense of the public interest in the public lands.

The approach taken by the Department has been approved by the Supreme Court many times. *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); Best v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Cameron* v. *United States*, 252 U.S. 450, 459 (1920); *Chrisman* v. *Miller*, 197 U.S. 313 (1905). And, this approach was clearly the law as applied to all mining claims in 1920. For example, in *Cole* v. *Ralph*, 252 U.S. 286 (1920), the Court stated:

> "The defendant testified that no ore was ever mined upon any of the lode claims, and that 'there was no mineral exposed to the best of my [his] knowledge which would stand the cost of mining, transportation, and reduction at commercial profit.' In the circumstances this tended to discredit the asserted discoveries; and of like tendency was * * * his further statement, referring to vein material particularly relied upon as a discovery, that he 'would hate to try to mine it and ship it.'"

252 U.S. at 299.

The Court very clearly understood the requirement of present marketability. This case was decided on March 15, 1920, less than three weeks after the enactment of the Mineral Leasing Act of February 25, 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1976). Among other things, that law withdrew oil, gas, oil shale and other minerals from locatability under the mining law and made the resource subject to disposition by leasing. The purpose, of course, was to preserve for the people of the United States the profits to be made from exploitation of the public lands. But the Act did preserve those claims which on the date of enactment met all of the requirements of the mining law, including, specifically, discovery of a valuable mineral deposit. *See*, *Hickel* v. *Oil Shale Corp.*, 400 U.S. 48, 55 (1970). The requirement of "discovery" referred to by Congress in the Mineral Leasing Act of 1920 is the same standard discussed by the Supreme Court less than three weeks later in *Cole* v. *Ralph*, 252 U.S. 286, 299 (1920), that is, the requirement of "present marketability."

The Court of Appeals for the Tenth Circuit states erroneously that the Department had a different standard of discovery for oil shale from 1915 to 1960. Slip op. at 4, 6, 15. While that statement is true for some time *after* enactment of the Mineral Leasing Act of February 25, 1920, it is totally lacking in any support for the period prior to then. No mining claim located for oil shale had ever been patented prior to enactment of the Mineral Leasing Act of February 25, 1920. Indeed, the legal question whether oil shale could be patented had never been addressed by the Department. That question was not raised until two months after enactment of the Mineral Leasing Act. On April 10, 1920, the General Land Office inquired of the Secretary whether oil shale could be patented. *Instructions*, 47 L.D. 548 (1920). The First Assistant Secretary replied that oil shale could be patented on the same basis as oil and gas under the oil placer act, the Act of February 11, 1897, 29 Stat. 526. While the Department recognized that no commercial operations were then being conducted in the United States, it assumed that many operations would soon be successfully brought on line, based partly on long-existing operations in Scotland and on substantial investment by the nascent oil shale industry in Colorado. As hindsight clearly shows, the Department was far too optimistic in its assessment of the then-current state of technology. But the Department in its 1920 opinion never for a moment suggested a different standard for patenting oil shale. Indeed, it expressly incorporated the standards applicable to oil and gas. And the Department's views were that oil and gas deposits had to be commercially valuable for the claims to be patented.

> "[O]il or gas in commercial quantities must have been produced, or it must lead to the conclusion that, from the discovery made, it can be produced in commercial quantities on the claim in question."

Oregon Basin Oil and Gas Co., 50 L.D. 244 (1923), aff'd, Oregon Basin Oil and Gas Co. v. Work, 6 F.2d 676 (D.C. Cir. 1925), aff'd, 273 U.S. 660 (1927).

The significance of the state of the law in or near 1920 is this. When Congress enacted the Mineral Leasing Act on February 25, 1920, it excepted valid existing claims, that is, those claims on which a discovery had been made. Were there actually a different discovery standard for oil shale than for all other minerals, it might be concluded that Congress had by enactment of the Mineral Leasing Act approved such a departure. But as is clear from Supreme Court decisions and from the record, there was no different discovery rule applied to oil shale until some time after 1920. Therefore, Congress could hardly have approved such a departure by enactment of the Mineral Leasing Act on February 25, 1920.

What sealed the doom of oil shale operations in the United States was the discovery of the East Texas oil fields in the early 1920's. From that point on, it was increasingly clear that oil shale would never be competitive with liquid petroleum. Nevertheless, the Department in 1927 issued a decision, which for the first time held that marketability at some future date under better conditions was sufficient to satisfy the discovery requirement of the mining law. Freeman v. Summers, 52 L.D. 201 (1927).

That decision was written by First Assistant Secretary E. C. Finney after the Department's chief legal officer, the Solicitor, and every member of the Solicitor's Office refused to write it.

All of this information is available in the transcript of hearings held by a Senate subcommittee in 1931. Ex. G-729. The Court of Appeals in this case apparently believes that those hearings led to Congressional approval of Finney's decision. Clearly, the Court of Appeals never bothered to read that transcript, for if it had, it would have discovered one of the most flagrant denials of due process in modern times along with a classic example of political arm-twisting. Indeed, it is just the kind of thing that Chancellor Bismark must have had in mind when he is said to have remarked that, "There are two things people should never see being made -- sausage and law."

The *Freeman* v. *Summers* case began with Summers filing an application on May 10, 1920 for a homestead. Summers filed final proof on May 22, 1923. However, the day before that, May 21, one Freeman filed a contest based on oil shale claims located before 1920. After a hearing, the Register and Receiver of the local office found that there was no discovery and held in favor of the homesteader, Summers. On April 26, 1924, the Commissioner of the General Land Office reversed the Register's decision and held in favor of the mining claimant, Freeman. On December 20, 1924, the Department, in a decision by Finney, expressly held that no discovery had been made. The Department reaffirmed this on May 23, 1925, in rejecting a motion for rehearing.

Inexplicably, the Department finally ordered a rehearing which was held in February of 1926 in Glenwood Springs, Colorado. The transcript of that hearing was ordered sent to Washington.

On September 29, 1926, Finney authorized oral argument in the case in Washington. On October 14, 1926, after being informed that Summers, the homestead claimant, couldn't afford to attend, the order for oral argument was revoked.

What occurred next is what gives the whole proceedings an unmistakable odor of political rot. Finney ordered what he later called a "general hearing" at which many political and private backers of oil shale pressed their view on discovery standards. There wasn't a single person in attendance who spoke for Summers or for any point of view different from those of the oil shale industry.

Nevertheless, the attorney assigned to write the decision in the case again found in favor of Summers, the homesteader. By February 27, 1927, that decision had been approved by a board of review and the Department's Solicitor. Finally, after all the attorneys in the Department refused to come to a different finding, Finney took the case himself and wrote a decision finding in favor of Freeman and the mining industry.

By 1930, one Ralph S. Kelley, Chief of the Department's Field Division in Denver, leveled certain charges against the Department due to the manner in which the decision had been reached. After much publicity, a subcommittee of the Senate Public Lands and Survey Committee held hearings. No report was ever issued and no recommendations were ever made.

The subcommittee was headed by Senator Thomas Walsh of Montana. He noted at the beginning of the hearings that he wasn't concerned over the correctness of the Department's decision but, rather, how it had been reached:

> "Senator Walsh: Let me remind you in this connection, before we go further, that it is a matter of very little consequence, as I take it, to this committee, as to whether a correct conclusion in any particular case was arrived at or not arrived at. We are more particularly concerned about how it came about that the department changed its view about the matter."

Ex. G-729 at 27.

That focus on the manner of change continued to occupy Senator Walsh's attention for the rest of the hearings.

> "Senator Walsh of Montana. There was no one representing Summers.
>
> Mr. Finney. No; Summers originally had a local attorney, but I understand Summers ran out of money, and the attorney did not appear at this time.

> Senator Walsh of Montana. So far as you know there was no one there representing Summers.
>
> Mr. Finney. No; sofar as I know.
>
> Senator Walsh of Montana. So far as you know, you can probably tell us definitely about this, there was no one who spoke there at the meeting against the contention made by the oil shale claimants?
>
> Mr. Finney. No. That is not the practice in our Government hearings, if you mean Government officials.
>
> Senator Walsh of Montana. Either Government officials or otherwise.
>
> Mr. Finney. No; no one was representing Summers.
>
> Senator Walsh of Montana. The contention of everybody who spoke was that the rule of the department had been too exacting.
>
> Mr. Finney. Yes."

_Id_. at 54.

> "Senator Walsh of Montana. The fact is, only one side of the question was discussed at that meeting of December 1, 1926.
>
> Mr. Finney. It was a general hearing.
>
> Senator Walsh of Montana. That is correct. There was a published notice asking anybody who wanted to be heard to come. As a matter of fact, no one did come except those who were arguing in favor of a more liberal construction of the law.
>
> Mr. Finney. That is correct."

_Id_. at 128.

> "Senator Walsh of Montana. Now just what have you to say of that kind of policy when there is a controversy of this character, such as was presented in Freeman against Summers, of the Secretary of the Interior calling in a lot of geologists and lawyers to discuss before him the very questions involved in that controversy?
>
> Mr. Finney. Well, Senator, that is not quite what occurred because he did not call them in. There was a demand from these people in Colorado to be heard.
>
> Senator Walsh of Montana. Yes; but his notice brought a great crowd of lawyers and geologists who all took one side of the case."

Id. at 139.

> "Senator Walsh of Montana. There was not anybody else -- there wasn't anybody interested on the other side except Mr. Summers, and he wasn't there at all."

Id. at 140.

> "Senator Walsh of Montana. Well, whatever they [Congressmen] were representing, there was not a word advanced in opposition to either the legal or the geological theories advanced to which attention has been called.
>
> Mr. Finney. No."

Id. at 141.

As is clear from the preceding colloquies, Senator Walsh's intention was not to inquire into the legal correctness of the Department's decision, but was rather an inquiry into the one-sided hearing held on December 1, 1926. However, the Court of Appeals apparently believes that a letter from the Chairman of the Public Lands and Survey Committee approved the Department's legal position.

> "Senator Nye, then Chairman of the Senate Committee, wrote a letter, at the conclusion of the hearings, to the Secretary of the Interior. This letter of April 1931 in part said:
>
> > Responding now to your letter of April 10, I have conferred with Senator Walsh and beg to advise that there is no reason why your Department should not proceed to final disposition of the pending applications for patents to oil shale lands in conformity with the law."

Slip op. at 11.

That letter is hardly an endorsement of the Department's legal position. A far more likely reason for the letter is that the mining claims owned by Freeman had all been cancelled for failure to perform annual assessment work, thus clearing the way for eventual reinstatement and patenting of Summers' homestead. See, e.g., Ex. G-739.

Moreover, the Court of Appeals also rests its opinion on a report in 1930 by the Department of Justice which seems to clear the Interior Department from any wrongdoing. Slip op. at 11-12. But during the Senate hearings, Senator Walsh, without saying so directly, implied that that report was something of a whitewash as it failed to mention any of the internal departmental conflicts leading up to the decision. Ex. G-729 at 170. None of these investigations or reports in any way bespeak congressional approval of the Department's legal position on oil shale.

The next significant event concerning oil shale occurred in 1956 when Congress enacted a law making it easier for oil shale claimants to clear up certain difficulties connected with obtaining complete title to their claims. Act of July 20, 1956, 70 Stat. 592, 30 U.S.C. § 122 (1976). But as the District Court for the District of Colorado noted in its decision below:

> "However, Congress did not specifically address the problem of discovery at all."

Shell Oil Co. v. Kleppe, 426 F.Supp. 894, 901 (D. Colo. 1977). Therefore, that law can hardly be said to have any bearing on the Department's policy on discovery.

Finally, in 1961, as the Court of Appeals notes, the Department decided that its prior practice of patenting oil shale claims was erroneous and decided to change its policy to conform to the law.

II. STATEMENT OF LAW

A. Discovery

As noted at the outset, every decision of the Supreme Court dealing with the discovery issue has held that it is a requirement of the mining law that there be marketability of the deposit at a profit as a presently demonstrable fact. See United States v. Coleman, 390 U.S. 599, 602 (1968), where Justice Black stated, "Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable." Best v. Humboldt Placer Mining Co. 371 U.S. 334, 336 (1963); Cameron v. United States, 252 U.S. 450, 459 (1920); Cole v. Ralph, 252 U.S. 286, 299 (1920); Chrisman v. Miller, 197 U.S. 313, 320 (1905).

The Court of Appeals for the Tenth Circuit, while not directly disagreeing with those decisions, carved out an exception for oil shale. That Court expressly recognized that oil shale does not meet the standard discovery test. Slip op. at 4. Therefore that Court's decision should be reversed as contrary to well-established law.

B. Legislative Ratification

As noted earlier in this report, the decision of the Court of Appeals is contrary to the Supreme Court's pronouncements in three separate cases. Legislative approval on far stronger facts than those pertaining to oil shale was denied by the Supreme Court in each case.

The first case involves that cause célèbre, the snail darter. Tennessee Valley Authority v. Hill, ____ U.S. ____, 57 L.Ed.2d 117, 98 S.Ct. ____ (1978). In that case, the Endangered Species Act prohibited destruction of an endangered species or its habitat by a federal agency. Nevertheless, the TVA proposed action which do just that, viz., completion and filling of the Tellico dam. The TVA fully informed the appropriations committees of the House and Senate which not only approved further funding but directed the TVA to proceed with construction. Those appropriations occurred both before and after the two decisions of the lower courts in this case. In one report, the committee even stated that the Endangered Species Act didn't apply in this case.

The Court carefully reviewed the language and intent of Congress and concluded that they didn't admit of any exceptions. 57 L.Ed.2d at 140. The Court also noted that there is no evidence Congress as a whole was aware of the particular appropriation committee's views and thus cannot be held to have acquisced in this action, even though the whole Congress had voted on the appropriations. 57 L.Ed.2d at 145.

The TVA case is much stronger than this one. Here, there was no subsequent legislation of any kind directed to the issue of discovery under the mining law. What hearings there were in 1930, were directed not toward the legal issue of discovery but toward how the Department had changed its views. But even if the hearings in 1930 had been directed to the discovery issue and even if the committee had approved the Department's view, there is no evidence that Congress as a whole knew of or approved the committee's views. The "affirmative action" the Court of Appeals speaks of is woefully short of the action in the TVA case.

Moreover, if we examine the intent of Congress in enacting the general mining law, the Act of May 10, 1872, as amended, 30 U.S.C. § 22 et seq. (1976), as well as the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. (1976), it is apparent that the exception carved out by the Court of Appeals contradicts the very purpose of the mining law. As the Supreme Court and the Department have both noted, the clear purpose of the mining law is and always has been the development of actual mining operations. United States v. Coleman, 390 U.S. 599, 602 (1968); United States v. Iron Silver Mining Co., 128 U.S. 675, 683 (1888); United States v. Winegar, 16 IBLA 112, 81 I.D. 370, 374 (1974). But, as the Department's decision in Winegar shows, these claims have been held for over sixty years without a scintilla of effort being expended on developing actual mining operations.

In fact, not one actual commercially successful mining operation has ever been developed on a single oil shale claim in this country.

The reason for this failure to develop is clear: there is no incentive. As long as the major oil companies can predicate "value" of oil shale claims on some hoped for future value, just so long will those oil companies continue to hold those claims as a speculative hedge against possible technological breakthroughs and just so long will there be no incentive to undertake actual investment in commercial operations. In other words, Congress will have given the major oil companies,which hold most oil shale claims, license to speculate with resources of the public domain. That result is an obviously absurd one and would vitiate the very purpose of the Mineral Leasing Act of 1920, that is, to save the income from certain minerals for the benefit of the people of the United States, except where substantial activity leading to commercial operations had already begun.

The second case on legislative approval decided by the Supreme Court in the last term is *Securities and Exchange Commission* v. *Sloan*, ____ U.S. ____, 56 L.Ed.2d 148, 98 S.Ct. ____ (1978). The SEC had authority to suspend the trading of stock for not more than 10 days when it was in the public interest to do so. The SEC had suspended the stock in question for more than a year by issuing successive 10-day suspension orders. The SEC had a long history of ordering successive 10-day suspensions. The particular statutory provision had been reenacted by Congress after the Banking Committee had been notified of and reported on the Commission's long-standing administrative construction. The Court stated: "We are extremely hesitant to presume general congressional awareness of the Commission's construction. . . ." 56 L.Ed.2d at 163; "Nor does the existence of a prior administrative practice, even a well-explained one, relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority." 56 L.Ed.2d at 161.

Again, the SEC case presents far stronger facts both as to congressional awareness and congressional participation by reenactment than does the oil shale case.

The third case decided by the Supreme Court in the last term in which it referred to legislative approval of agency practice is *Adamo Construction Co.* v. *United States*, 434 U.S. 275 (1978). The Environmental Protection Agency had sought to have criminal penalties imposed on the construction company for violation of an "emission standard." The company argued successfully that the "emission standard" was in reality a "work practice standard" for which criminal penalties were inappropriate. The Court rejected the EPA's argument of legislative ratification by reenactment with knowledge of agency practice. The Court set forth some factors to be observed in determining whether legislative ratification has occurred at n. 5:

> "This lack of specific attention to the statutory authorization is especially important in light of this Court's pronouncement in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), that one factor to be considered in giving weight to an administrative ruling is 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"

Utilizing those standards, it is clear beyond preadventure that the administrative construction should not be sanctioned by the courts. The policy was not only not thoroughly considered, but arrived at through a completely one-sided hearing that grossly denied the rights of the public and the homestead claimant involved in this case. The validity of its reasoning was properly characterized by the Board of Land Appeals as "obtuse." The man who wrote *Freeman* v. *Summers*, 52 L.D. 201 (1927), E. C. Finney, cited only one case in support of the proposition of possible future value satisfying the discovery requirement. *Narver* v. *Eastman*, 34 L.D. 123 (1905). That case has no relevance to the general mining law as it involved an entirely different law, the Timber and Stone Act of June 3, 1878, 20 Stat. 89, repealed, August 1, 1955, 69 Stat. 434. Moreover, as the Board demonstrated in *Winegar*, 81 I.D. at 393, that case on its face is one of the dimmer pieces of "logic," and we use that term loosely, ever engaged in by an administrative agency. Finally, that case is totally contrary to all prior and subsequent precedent involving the general mining law. It's fair to say that the case is *sui generis*.

By the standards set forth in Adamo and Skidmore, then, the Court of Appeals is incorrect in its reliance on long-continued administrative practice. All three cases decided in the last term by the Supreme Court presented much stronger fact situations in favor of finding legislative approval of agency action. The Court of Appeals is in error on that point and should be reversed.

C. Conflict in the Circuits

As noted earlier, there is now a conflict between the Courts of Appeals for the Ninth and Tenth Circuits. Shortly after the Supreme Court's decision in United States v. Coleman, 390 U.S. 599 (1968), the Court of Appeals for the Ninth Circuit was presented with the question of whether a particular mineral should be exempted from the requirements of "present marketability." That Court answered: "We think it clear that the marketability test is applicable to all mining claims." 399 F.2d at 621. The decision of the Tenth Circuit is contrary to that holding and should be resolved by the Supreme Court.

D. The Department's Decision and Authority to Contest these Claims.

The Court of Appeals states in its opinion that the Department in its decision, United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974), gave "[n]o reason . . . for the complete departure from the previous holdings. It is apparent that no changes in circumstances relative to oil shale and its development have come about. It is purely a change in departmental policy which came about by a change in the philosophy of the personnel." Slip op. at 16. Nearly all of the Department's decision in Winegar is aimed at explaining precisely why the Department viewed prior oil shale policy as legally incorrect. That explanation apparently missed the mark with the Court of Appeals.

As the Supreme Court has noted many times, the Secretary of the Interior is the trustee of the public lands for the people of the United States. Utah Power & Light Co., 243 U.S. 389, 409 (1917).

> "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none

> of the public domain is wasted or is disposed of to a party not entitled to it."

Knight v. United States Land Ass'n., 142 U.S. 161, 181 (1891).

Where the Secretary believes a mistake has been made which would result in the unlawful disposal of public lands, he is not obliged to sit idly by and see these lands wasted merely because one of his predecessors made a mistake. As Justice Lamar, a former Secretary of the Interior, stated in Knight v. United States Land Ass'n., 142 U.S. 161, 178 (1891):

> "For example, if when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings . . . it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul."

Accord, West v. Standard Oil Co., 278 U.S. 200 (1929). And see Michigan Land & Lumber Co. v. Rust, 168 U.S. 589, 593 (1897), where the Court stated:

> "It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. Cornelius v. Kessel, 128 U.S. 456; Orchard v. Alexander, 157 U.S. 372-383; Parsons v. Venzke, 164 U.S. 89."

And as the Court noted in West v. Standard Oil Co., 278 U.S. 200 (1929), the Secretary is under a duty to correct legal errors of his predecessors in order that the public domain not be wasted.

The foregoing report shows that the decision of the Court of Appeals for the Tenth Circuit is clearly erroneous both as to the facts and to the law. We recommend in the strongest terms that a petition for a writ of certiorari be filed in this case. While this report is, however, a preliminary report, and, hence, is necessarily somewhat brief, and while a more complete analysis of the Court of Appeals' decision will be supplied as soon as possible, we recommend that immediate steps be taken to seek review in the Supreme Court.

2605 Stanford Ave.
Boulder CO 80303

September 4, 1986

The Honorable Nick Joe Rahall
Chairman, Subcommittee on Mining and Natural Resources
U.S. House of Representatives
Washington D.C. 20515

Dear Chairman Rahall,

In response to Mr. Jim Zoia's request for comments on your bill H.R. 5399 I believe that corrective Congressional action in the direction sought by this bill would definitely be in the public interest and is urgently necessary.

I have followed oil shale matters in Colorado since the very early 1960s. I request that this letter be printed in your hearings.

Also, on October 27, 1975, I testified on this subject before the House Subcommittee on Fossil Fuels of the Committee on Science and Technology. My statement was published also in the Congressional Record of December 18, 1975 at pages H13046-13048. Recent events show that my testimony then was "right on the beam." You might wish to enter my earlier statement in your own hearings because it suggests a degree of continuing negligence and mismanagement in the U.S. Department of Interior in the intervening years without parallel in any other department.

Some General Observations

Based on my study of oil shale issues I believe the following are relevant facts for your Subcommittee to consider in its action on H.R. 5399. Please bear in mind that the bill should be carefully redrafted so it really takes care of the existing mess involving the public oil shale lands in a way which does not open any more loopholes for needless and unproductive divestiture of such public domain. The real task ahead is to stop disposal of such lands as the Mineral Leasing Act of 1920 intended.

1. The purpose of allowing mining claims on public lands is to put needed minerals into current commercial production. The oil shale mining claims filed before Feb. 25, 1920 have failed to do this. The Congress wisely enacted the Mineral Leasing Act of 1920 to provide that oil shale lands should be leased, not sold.

2. As early as 1965 some 350,000 acres of oil shale land containing up to 300 billion barrels of potential extractable oil were already in private ownership. Since then virtually none of

this oil has been extracted. These lands alone are enough to keep a large oil shale industry going for the next 50 years or longer if it is true that they were patented for bona fide mining purposes.

3. The August 4, 1986 Interior/Justice agreement to grant additional patents on 525 claims covering some 82,000 acres of oil shale lands disregards the correct statement in point 4 of your bill that in 65 years these claims have not been developed to the stage of production. Indeed, it is evident that, despite huge federal subsidies, the U.S. has no feasible technology to produce oil from oil shale on a basis to compete commercially with liquid or gaseous petroleum. I fail to see how the agreement meets the true intent of the U.S. mining laws as enacted by the Congress.

Interior Secretary Hodel's public statement that he intends to follow the precedent set by this agreement in adjudicating other pending claims--which total some 280,000 acres-- indicates an intent to "privatize" public oil shale lands far beyond and any legitimate purpose. Indeed, as point 8 in your bill suggests, future development of oil shale lands would be undercut by helter-skelter granting of further patents.

4. Ironically, the patenting of all the pending oil shale claims so 700,000 acres would be in private ownership would not really lead to the development of a viable oil shale industry--because the richest, thickest oil shale lands, which should be the first to be mined would still be in public ownership and would have to be leased.

Further patents would merely enrich speculators immensely: Interior has estimated that the 82,000 acres are worth nearly half a billion dollars (perhaps to give its clients bargaining leverage in case the Government should "take" the claims). In any event, at this rate the entire 360,000 acres of public claims will be worth nearly $2 billion. Why should these huge sums literally be given away at a time of $230 billion budget deficits? (Note that any amount the Government might spend for litigation expenses to protect the public interest in these matters effectively would be negligible relative to the values involved.)

5. The lengthy draft brief and analysis prepared by the Interior Regional Solicitor's staff in Denver, urging appeal of Tosco v. Hodel (1985) demonstrates that this decision is filled with errors of fact and law. It is inconceivable that the Secretary of Interior can support the August 4 agreement without having personally read the critique prepared by his professional staff in Denver. He told to the press he had not read it.

The most telling indication that the District Judge's decision is faulty is that his decision is to be vacated after the 525 patents are granted in order to quash the damaging precedents it sets for public lands generally. To rely on a District Court decision which is so faulty that it must be vacated is hardly a proper way to conduct public business. That decision ought to be vacated before it is implemented.

6. The Congress should obtain a thorough professional investigation by the General Accounting Office of the management and patenting of oil shale lands by the Department of Interior. Mismanagement, politicized policy making, lack of adequate, well-led professional staff to prepare and present contests and court cases has been the root cause of the failure to protect the public interest in the oil shale domain. An earmark of the Department's repeated capitulation to claimants has been its recourse to ruthless elimination and transfer away from oil shale assignments of able and dedicated professionals who opposed the patenting of questionable claims.

Because of these management deficiencies the Department has deviated from the original intent of the mining laws by making administrative decisions which favor claimants and it has been lax and deficient in its preparation for and presentation of evidence in contests and court cases. Too often the Department made only a minimum effort when the huge stakes involved dictated maximum action. (I do not minimize the signal efforts of quite a few dedicated individuals who fought vigorously against a giveaway tide.) Even after the Department knew better, bad decisions were hidden from the Courts and the public instead of being candidly presented as mistakes which needed rectification. The Department for many years adhered to the erroneous, arguably corrupt, rules laid down administratively in 1927 in the Freeman v. Summers decision--and it still does. Yet competent Interior attorneys have officially called this decision "an infamous holding based on a cavalier disregard of the public trust...." It is time to bring those matters out in public to protect the public interest by real action.

7. It is significant that in awarding proposed patents on the 525 claims, the Department of Interior will not be assisting the original claims filers or their heirs in the great majority, if not all, of these cases. Those filers or their heirs sold claims they considered worthless "for a song". The Government will be enriching the speculators and monopolistic oil companies whose lawyers have breathed hypothetical legal life into those old, unproductive claims with the connivance of officials who failed to protect the public interest.

Suggested Improvements in H.R. 5399 Relating to Criteria for Validity of Mining Claims

1. The key to restoring sound management of oil shale lands in Interior is to re-establish strict, public-interest criteria for adjudicating applications for patents on pre-1920 mining claims. The legislative history of the Mineral Leasing Act of 1920, indeed, shows that strict adjudication was the intent of the Congress. To re-establish this purpose, it is necessary for the Congress to re-enunciate the original Congressional intent of 1920. It must enumerate a comprehensive set of definitive, strict standards which correct the egregious administrative and court decisions during the years 1921-85 which promulgated pro-claimant, make-believe criteria for discovery by geological inference, enunciated a nebulous "prospective" value rule for judging economic value, and tolerated lax standards for claim maintenance.

The main steps toward re-establishment of realistically strict criteria as intended in 1920 would be to require the same standards for oil shale mining claims as are required for mining claims for other minerals, such as to (a) require genuine physical discovery of a valuable mineral, (b) return to the "prudent man" rule of *Castle v. Womble* (1894), and (c) require full challenging of all claims on all relevant charges to make sure that they were *bona fide* mining claims at filing, remained so throughout the intervening years, and are valid at the time of application for patent.

2. In view of the history of non-development of oil shale from 1920 to the present, the question should be raised as to whether oil shale can be considered a *presently valuable mineral* as general mining law requires. Therefore, this raises the further question whether presently any outstanding oil shale claims are truly valid under the mining laws.

3. On the crucial issue of discovery, the politically-fixed *Freeman v. Summers* decision of 1927 gutted earlier criteria for the physical and economic evaluation of oil shale mining claims. The make believe criteria stated in that decision were allowed by an inept,client-dominated Department of Interior, which in the 1960s knew better, to carry over into the *Andrus v. Shell* (1980) decision by the Supreme Court and to become the cornerstone of *Tosco v. Hodel* (1985) decision by the District Court in Denver. Geologic and economic principles have been corrupted by erroneous interpretations of the law in the field of oil shale mining claims.

There is extensive valid information on the basis of which the Congress can set aside the erroneous and unsound decision criteria initiated by *Freeman vs. Summers*. This information is (a) in the Interior case file on that decision; (b) in the "Post Hearing Brief and Appendix for the Contestant" (the Government) in *U.S. v. Frank W. Winegar* and *U.S. v. D.A. Shale, Inc.* (Colorado contests 359 and 360), dated May 20, 1968, consisting of 5 volumes totaling over 1,600 pages; and (c) the "Opening Postbearing Brief of Contestant" (The Government) in U.S. v. Weber Oil Co, et al. dated March 12, 1982 (Colorado contests 193, 260, 685, 686, 687, and 688) consisting of over 300 pages plus appendices--and the "Reply Brief of Contestant" in the same cases, dated May 26, 1982, and consisting of over 100 pages plus appendices.

Your Subcommittee should restate the physical and economic discovery criteria to return them to their pre-1920 status. There must be real physical discovery of a truly valuable mineral, and the value of the discovery should be based on "present" value concepts used in business financial analysis. Bear in mind that in any given generation only a small fraction of the oil shale already in private ownership can be mined profitably--even assuming that a feasible technology becomes available. But there is no proven economically feasible technology yet. The potential "prospective" values of oil from shale cannot be recouped in the market today because analysts discount them for the value of the opportunity costs of money, which severely reduces the worth of future income.

4. The sources cited in the preceding point 3 also provide rich information on numerous reasons why various pre-1920 mining claims may not have been valid in 1920 or have become invalid during the years 1921-86 even if they once met discovery standards. Failure to perform required assessment of $100 year annually on each claim is only one of such reasons. By itself it is an inadequate factor on which to base H.R. 5399.

Your bill should include a comprehensive list of possible reasons why various pre-1920 claims may be invalid--and require the Department of Interior to prepare charges for every reason for which reasonable supporting evidence can be assembled. My tentative list, in addition to the lack of proper discovery, includes:

O Loss of discovery due to changing economic circumstances, as when the price of oil in the 1930s was less than $1 a barrel and oil shale claims became worthless.

O Improper or fraudulant location of claims.

O Use of dummy co-locators.

O Location for non-mining purposes, e.g., for speculation, grazing, etc.

O Failure to perform annual assessment work of $100.

O Failure to do $500 of improvement on each claim.

O Adverse possession of land by Government.

O Oil shale is a non-metallic mineral of widespread occurrence, all of which cannot be simultaneously developed, so it should be treated according to the restrictive discovery rules applicable to sand and gravel mining claims (marketability at a profit).

- Failure to develop claim for mining within a reasonable time.
- Abandonment of claim (as among other indicia, acquisition under quit-claim deed for nominal consideration, and use of assessment work procedures under 30 U.S.C. 28 to forfeit out original co-owners). Deception of original locators or misuse of forfeiture procedures to deny them due notice should also be considered.
- Issuance of conflicting patents.
- Non-mineral land of 10 acres or more on claim.
- Claim not valid and subsisting on Feb. 25, 1920.
- Land not chiefly valuable for oil shale.
- Fraud in location or application for patent.
- Contravenes or denies established or higher public use of land under guise of a mining claim.
- Failure to meet affirmative standards for a productive venture to produce oil commercially in 65 years of claim.
- Lack of foreseeable economic prospects for future profitable commercial oil production from shale within a reasonable period, e.g., 20 years.
- Previously investigated and declared null and void by Interior Department.

5. There are two specific areas on which the Congress should obtain follow-up information from Interior on the background of the 525 claims to be patented under the Interior/Justice agreement with the claimants under pressure from the Judges in Denver. Point 7 of Chairman Udall's letter of August 5, 1986 to Secretary Hodel requesting various items of information elicited less than a full page of "history" about these claims. The information submitted, in my opinion, is wholly inadequate and perhaps is misleading.

Your Committee should request the Department to submit more complete information on all 525 claims covered in the settlement on two points, as follows:

A. On the issue of possible fraud: On every claim (or group of claims) among the 525 in the agreement on which the Department of Interior may have alleged fraud, ask the Department to submit copies of (a) the documents making such charges; (b) the evidentiary documents (exhibits) used in the contests or court cases to support the charges; (c) the Departmental briefs in the contests and/or court cases, with specific identification of the sections related to the issue of fraud; and (d) the decision documents ruling out fraud, with specific identification of the sections doing so and the reasbns for dropping the charges of fraud.

B. On the issue of purchase of possible abandoned claims from former claimants: For each group of claims (or claim) in the 525 covered by the settlement in which forfeiture proceedings have been used, ask the Department to submit (a) a description of the known activities on oil shale lands of the original claim filer(s), particularly their efforts to sell shares in the claims and any information bearing on their capability and/or efforts to develop production from the oil shale; (b) a succinct description of the chain of title to each set of claims from the original claimants to the present owners or option-holders with information on the purchase price in total and per acre at each transaction stage and who received the proceeds; and (c) for every group or claim in which a forfeiture proceeding was used, a full description of (1) the history of the annual assessment work performed on each claim plus any other facts bearing on possible active development vs. abandonment; (2) the date and amount paid in total and per acre by the person using the forfeiture procedure and the name(s) of the recipient(s); and (3) a description of (including copies of) the advertisements and other documents used in the forfeiture proceeding; and (d) copies of the Interior Department contest complaints, evidentiary documents (exhibits), briefs, etc., addressing the issue of abandonment or related sale of claims for nominal considerations and their subsequent presentation to the Government as valid mining claims. This information should also address the issue of whether the original claimants or their heirs may have been defrauded if, indeed, they sold valid claims for negligible sums--and whether, later, they were properly questioned by the Department of Interior as to their knowledge about the early history and validity or invalidity of the mining claims which they had sold.

6. It would be prudent for your Committee to request the Secretary of Interior for a definitive Departmental position paper on oil shale law, prepared by his most knowledgeable and experienced lawyers and related experts on oil shale, comparing the main provisions of oil shale law as it would be if the Tosco v. Hodel decision stands vs the law prior to this decision vs the law that his experts believe would be in the public interest if they were writing it today. What charges to challenge the validity of pre-1920 would be considered appropriate and feasible under each of these three situations?

Suggested Options for Proper Resolution of Pre-1920 Oil Shale Mining Claims

As a counterpart to re-setting and clarifying the criteria for oil shale mining claims to restore to them the strict intent of the Congress when the Mineral Leasing Act of 1920 was enacted, I suggest that several sets of actions might be appropriate to give fair treatment to claimants who may have bona fide mining claims while fully protecting the interest of the American people in their public domain:

1. Along with clarifying the criteria for adjudicating the pre-1920 claims, as suggested earlier in this letter, to restore

the standards to the 1920 Congressional intent and the then strict, valid standards, the Congress might take three further actions with respect to all oil shale claims not covered by the August 4, 1986 settlement:

a. Embargo issuance of any further patents by the Department of Interior on such claims until each claim for patent is fully re-evaluated in the light of the revamped standards and readjudicated accordingly.

b. Direct the Secretary of Interior to have his Department organize and conduct a full-scale adequately-staffed professional review, reexamination, and contesting, where appropriate, of such claims on the basis of the full set of criteria directed by the Congress.

c. Authorize and appropriate adequate funds to carry out a full-scale re-evaluation and readjudication of outstanding claims. Given the multi-billion-dollar potential values of these public lands, such appropriations will be comparatively small and hence very cost/effective.

2. With respect to the 525 claims covered by the August 4, 1985 settlement, a series of actions by the Congress is urgently necessary and is presented for your consideration:

a. Conduct an immediate legal and factual review to determine whether the subordinates from the Interior and Justice Departments who signed the assertedly half-billion August 4, 1985 settlement indeed exercised their authority properly in disposing of these claims for $2.50 an acre under the cover of an error-filled judicial decision capping a pyramid of make-believe criteria invented in earlier years by political appointees who disregarded their oaths of office in order to please claimants who wanted to be instant millionaires? Do these mining claims, which had checkered histories and in 65 years have never produced a barrel of oil commercially from oil shale, meet the requirements and intent of the U.S. mining laws in fact, as distinguished from erroneous interpretations of such laws? Did the Secretary of Interior, who apparently knew of but never read the documents from his Denver professionals urging a full appeal of Tosco v. Hodel, properly exercise his authority in authorizing his political subordinates to sign away a half a billion dollars worth of land? Did he so authorize them? Had his subordinates read and discussed those documents with the professionals who earnestly prepared them? Did the Department of Justice officials up to its very top see and read those documents? Did the Department of Interior indeed have the authority under law to divest the public of the ownership of this oil shale and the surface while retaining rights to other minerals? Was proper notice given to the State of Colorado (which will lose half of the bonuses, rentals, and royalties from potential oil shale leases)--and to the Federal grazing lessees, the hunters, the wildlife people and to the general public, that this "deal" was cooking? Did the Secretary of Interior or his delegatee breach his trusteeship responsibilities for protecting the public lands of the American people by entering the August 4, 1986 agreement involving the 525 claims?

b. *Order the Secretary of Interior* to renegotiate the August 4th settlement agreement to provide that if each set of claims at the end of 20 years is not a "going oil shale mining venture" producing shale oil commercially, the claims shall revert *en toto* to the U.S. Government. It makes no sense to dispossess the public domain of vast acreages of claims which have been in the records of county court houses for over 65 years without any real shale oil production from them --and then to turn them over forever to private hands under the guise that they are going to be oil shale mining ventures without any commitment on the part of the claimants that this will happen. If these are mining claims then the Government should require that they be developed as such as a condition of private control of such lands--and if they are not so developed, then patents should not be granted. Your idea of allowing leases seems better.

c. *Instruct the Secretary of Interior*, through a new law if necessary, not to issue the patents on the 525 claims, pending the completion of a full Congressional review of the facts and the law behind this disposal. In the meantime, ask the General Accounting Office to make a complete investigation of the validity of the 525 claims and of the Interior and Justice Department actions on those claims.

d. *If Congress determines* that the foregoing three steps on the settlement will not be effective to timely block issuance of the patents under the August 4, 1986 agreement, Congress should have its attorneys evaluate all available past, present, and possible additional evidence to determine whether there exists a basis--under all the facts and circumstances surrounding the negotiations, the questionable rulings in *Tosco v. Hodel*, and in the execution of the agreement--upon which to bring a suit to enjoin and annul the agreement by the Executive Branch. If there exists a basis to support such a suit, Congress should bring it without delay, possibly in conjunction with affected states and/or public interest organizations.

e. *If nothing else avails, the Congress should direct the Secretary of Interior* to "take" old claims in the national interest under the Tucker Act or other available authority and allow the claimants to seek compensation for their just expenses in developing the claims from the Court of Claims, as is essentially provided in the last paragraph of your bill. If there is inadequate statutory authority for such a taking, the Congress should provide it if this option is utilized--along with provision for just compensation for any valid interests taken.

I appreciate the opportunity to respond to your request for comments.

Respectfully,

Michael S. March, Ph.D.

cc: The Honorable Morris Udall
The Honorable Gary Hart
The Honorable Mike Synar
The Honorable Sidney R. Yates
The Honorable Timothy E. Wirth

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BLM.RM.0502

F. Henry Habicht, II
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington DC 20530

Re: Appeal Recommendation in TOSCO v. Hodel, Civ. Nos. 8680, etc. (D. Colo., filed May 1, 1985)

Dear Mr. Habicht:

This office recommends that an appeal be vigorously pursued in the above-captioned case for the reasons stated in the attached enclosure. A protective notice of appeal has already been filed with the Court of Appeals for the Tenth Circuit.

Sincerely yours,

Marian Blank Horn
Principal Deputy Solicitor

Enclosure

CO-910
3800

OCT 1985

Memorandum

To: Director (100), Interior, Room 5660
Director (101), Interior, Room 5651

From: State Director, Colorado

Subject: Appeal of the District Court's Decision of May 1, 1985, Judge Sherman G. Finesilver (TOSCO v. Hodel, 611 F. Supp. 1130 [D. Colo. 1985]) and Discussion of Settlement Provisions

For the reasons set out in the enclosed Analysis and Executive Summary prepared by the Regional Solicitor's Office, I strongly urge the appeal of the May 1, 1985, judgments. I previously expressed my recommendation to appeal in my memorandum dated May 13, 1985, supported by the Regional Solicitor's concurrence dated May 16, 1985. I feel that this case and its final disposition will have a far greater impact on public land management than an initial observation would indicate.

The Finesilver decision will affect not only 1,186 claims in Colorado covering 190,000 acres, but will impact 1,077 claims in Utah and Wyoming for a total of over 360,000 acres of public land.

Oil shale is not yet a valuable mineral, as evidenced by the fact that it is not produced commercially; furthermore, it never has been in this country. It must be remembered that oil shale claims can be mined without patent issuance, but none are. We cannot justify to the public, as trustee of the public lands, the giving away of 360,000 acres of land at $2.50 per acre under the mining laws when no prudent man would develop the mineral resource. I don't feel that the intent of the mining laws is simply to transfer surface estate.

I feel that the energy industry, the public, and state and local governments would not agree to this disposition of the public lands when we cannot defend the position that oil shale is commercially viable. In all probability, should this decision be allowed to stand, these lands would be developed for some other commercial uses. This would include townhouse type recreational development and other enterprises which entail subdivision into small areas. These measures could preclude society from realizing any benefit from the production of these minerals should they ever become commercially productive. Potential future revenues to State and Federal Governments from orderly development under mineral leasing laws will be foregone.

The following issues should be assessed prior to any decision on this case:

1. Accusations of "give away" of 190,000 acres of public land in Colorado;
2. Loss of Mineral Leasing Act revenue to the Treasury and to the State;
3. Uncertain ownership and management authority for 190,000 acres of existing oil and gas leases which cover the oil shale mining claims;
4. Oil shale has not been produced commercially from private lands, unpatented mining claims, or leased public lands and, therefore, cannot be characterized as a valuable mineral under the mining law;
5. Over 50 grazing permittees will lose almost all or some portions of their grazing permits;
6. Loss of 1,300 acres of public water reserves (natural springs and developed water sources) for domestic stock and wildlife.

I feel that this impact will not be limited to oil shale claims, but the decision will be precedent-setting for other mineral claims in all states and will affect the entirety of the public lands. Long-standing mining law obligations, such as performance of annual assessment work and physical finding of a valuable mineral, will be eroded or extinguished.

A broad application of the Finesilver decision (now published in the Federal Supplement) to other minerals under the May 10, 1872, mining law is contrary to numerous Federal court and Departmental precedents and to congressional intent. This broad application would allow the novice to indefinitely tie up huge areas of public land at minimal cost, putting the future of public land mineral development in jeopardy. The mining laws would simply be used to tie up or acquire huge surface estates, and this would be done without the necessity of proving of any commercial mineral. It also puts a cloud on all mining claims the Bureau has invalidated for various reasons in recent years.

For the above reasons, I strongly urge an appeal of the Finesilver decision and the termination of settlement discussions as counterproductive to public land management. This decision cannot be justified to the American public unless sustained all the way to, and including, the Supreme Court

Rocky Mountain Associate Regional Solicitor Lowell Madsen is clearly the Department's most expert legal advisor on oil shale. His counsel and advice are critical to developing and implementing a strong position by the Department to appeal this decision. I strongly recommend that he be used in this capacity.

/s/ Kannon Richards

Enclosure

cc: Director (500), (640), (670), (680)
Office of Regional Solicitor (Attn: Lowell Madsen)

bcc: DMs, Craig and Grand Junction

Rewritten by KRichards/BMoore:bl:10-9-85:0612S

STATEMENT OF MICHAEL S. MARCH REGARDING OIL SHALE DEVELOPMENT AND MANAGEMENT ISSUES BEFORE THE HOUSE SUBCOMMITTEE ON FOSSIL FUELS OF THE COMMITTEE OF SCIENCE AND TECHNOLOGY AT BOULDER, COLORADO ON OCTOBER 27, 1975

Chairman Wirth, I wish to thank you for giving the people of this area an opportunity to testify on the immensely important issues relating to the impending development of oil shale as a source of energy for our country. As an economist and public administrator who has previously spent some twenty eight years struggling with public policy issues in the U.S. Bureau of the Budget and Office of Management and Budget, I welcome the opportunity to testify briefly on three major public policy issues that are raised by the Federal government's handling of oil shale. My statements are strictly my own and do not in any way reflect the views of any organization for which I now work or for which I have worked.

My testimony deals with issues which overshadow the question of oil shale industry development. I have come to urge a major Congressional investigation of the Department of Interior's mishandling of oil shale lands. Huge blocks of oil shale lands or rights to land have been literally given by the Department to private individuals and oil companies under very loose procedures and on the basis of questionable premises and administrative or legal determinations. Even larger acreages are threatened with feckless outright disposal at an 1872 price of $2.50 an acre or leasing for bonuses of 3 cents or so a barrel equivalent.

I urge that the Congress immediately ask the Executive Branch to embargo such disposals or leasing of oil shale lands until the Congress can review the past record and report to the American people on what has happened to *their* oil shale lands. As part of this, I especially urge that the Congress lay out remedies on behalf of the people with regard to oil shale lands disposed of for $2.50 an acre illegally or erroneously without the authority of law in the years 1920-1960.

I am prepared to tell where the Congress can find the records which illuminate these problems. One place to start is the 5-volume "post-hearing brief" in 1968 by the Department of Interior in Colorado Contests No. 359 and No. 360 in *U.S. v. Winegar* (and Shell Oil) and *U.S. v. D. A. Shale, Inc.* The Department made a fine start in these papers, but has not applied the resources in manpower and money to follow through in cleaning up the mess.

My analysis of oil shale issues is heavily colored by six points:

(1) The oil shale lands of Colorado, Utah, and Wyoming contain immense amounts of energy. Published figures indicate potential recoverable shale oil totaling between 1 trillion and 2 trillion barrels--compared to some 30 billion barrels of presently proved crude petroleum reserves in the U.S.

(2) These vast oil shale riches are still predominantly a national government resource. An estimated 85% of the shale oil is still in federal domain holdings. However, private holdings, largely by major oil companies, contain somewhere between 100 and 300 billion barrels of potential oil.

(3) Published reports suggest that if oil shale were properly developed as a public resource, over the years it could pay off our national debt and in addition leave many thousands of dollars of proceeds for each person in the United States.

(4) As my testimony will show, the United States government, particularly the Department of Interior, has grossly mismanaged development of oil production from shale. Worse yet, it has grievously failed in discharging its public trusteeship of the oil shale lands and has recklessly permitted the so-called "user" interests to enrich themselves to the detriment of the public interest. This failure has involved both Republican and Democratic administrations during the last fifty years. The Congress has also neglected to get on top of this mess.

(5) The focus of oil shale land activity through the years has been almost entirely speculative--to get rich quickly by euchering the land out of the public domain or by trading in the raw land or getting suckers to "invest" in it. The multinational oil corporations have also worked through their front organizations to "lock up" the oil shale lands--before the people appreciated the true value of the riches buried in the oil shale. It is significant that despite all the hullabaloo and the several hundreds of billions of barrels of oil in oil shale already owned by major oil companies, there is still no economically producing oil shale industry in the U.S. Yet the big oil companies are still pressing hard to get more of the oil shale away from the Federal government and under their own control.

(6) The U.S. people need oil from oil shale and it is inevitable that an oil shale industry will come in Colorado. However, past policies followed by the Federal establishment, and those proposed now by the Ford Administration, simply play into the hands of the oil monopolies. We need a new set of rules which will put the peoples' interests first--policies which will demand performance in development of an oil shale industry without giving valuable public rights away blindly and prematurely.

I should like to qualify the foregoing generalizations in two respects: First, any figures in my testimony must be treated as approximations, and even guesses, because it is impossible to get any firm, documented figures from the U.S. government. The Department of Interior's figures are notoriously unfirm. Second, I wish to indicate that my generalizations are grounded on some years of rather significant professional experience in public program analysis. I do not hold myself out as an expert on mining laws and/or on the technical or legal aspects of oil shale, but I have confidence in my ability to diagnose a gross failure in public policy.

In the light of the foregoing points I would like to give your Subcommittee and the Congress of the United States my views on three major points with respect to national policy with respect to oil shale lands and their development as a producing source of oil:

First, I conclude that the Congress would be on sound ground if it rejected--or very drastically tightened up--certain pending proposals for multi-billion dollar loan guarantees or loan assistance to the oil companies for the development of oil shale and other synthetic fuels. I have reference here to the $6 billion loan guarantee proposal included in the Senate ERDA authorization now pending in the Congress and the $100 billion Energy Independence Authority proposed by the Ford administration.

These proposals would make the taxpayers bear the risks and give the profits to the oil industry. They appear to be a "no-win" proposition for taxpayers. As these proposals are now drawn, the taxpayers could be hooked for billions and end up without a producing, economically-viable oil shale industry.

The need for public financing of oil shale development has not been established,because the oil companies are reaping multi-billion dollar profits from oil each year and are still benefiting from special tax provisions. The oil business is not a depressed industry. There is no assurance that the ladling out of additional huge public handouts to the oil companies would indeed create a properly developed oil shale industry. Further, I do not believe that the fragile Western environment should be entrusted to the administration of the oil industry with its record of oil spills and environmental destruction. The West cannot afford to turn its water over to the oil companies for oil-shale development and dry up its agriculture and its cities.

As a budget and fiscal analyst with many years of experience, I urge the Congress to turn down any proposal for "back door" or "off budget" financing of assistance for oil shale and energy development of the sort that is now being proposed by the administration and the oil interests. I am concerned about the runaway federal budget. One of the more serious aspects of this problem is in the present huge "off budget" credit programs which are running between $25-30 billion per year and have, according to Secretary Simon of the Treasury, amounted to $150 billion in the last decade. These programs almost invariably represent poor priorities and are a source of inflation because they sidestep proper budget scrutiny by the OMB and by the Congress. The OMB seems to have lost its senses in supporting such "off budget gimmicks" for oil shale.

I urge that every dollar for energy development be authorized through the substantive committees and in addition be subject to the regular appropriations process of the Congress. This is especially important when the proposed beneficiaries represent the powerful oil companies which have enormous lobbying capabilities. The resort to "back door" budgeting, such as the Ford administration proposes for energy programs, raises a major risk of wrecking the financial base of the American economy because ordinary rules of budgetary prudence and normal procedures of budgetary review will be disregarded. Look at what happened to New York City because it gimmicked its budgets.

I do not believe that public funds or public guarantees should be provided to oil companies for development of an oil shale industry without bearing any risks. How can anyone justify turning over shale oil in publicly-owned land for pennies per barrel, then providing government capital for development at public risk, and then letting the oil companies sell any oil which may be produced to the taxpayers at a profit to the oil companies? This must indeed be a form of socialism for the benefit of corporations.

If the United States government is really serious about oil shale development, it should create a Federal Oil Shale Corporation so that public risk-taking will be accompanied by public profit-making if the enterprise is successful. We need a properly-planned regional undertaking, not hit-or-miss checker-boarding of public lands by various corporations whose principal objective is to preempt. Permit me to point out that when it came to development of a new atomic technology, the United States launched the Manhattan District project and got the job done expeditiously. The oil companies do not really want to mine oil shale, they want to milk the treasury.

If the Federal government is to subsidize private oil shale industry development, the subsidies should be completely out in the open, their purpose should be set out fully and explicitly to the Congress, the oil companies should by contract stipulate what they are going to invest and achieve, and the subsidies should be included in the Federal budget and be reviewed regularly by the Congress and the OMB. The oil companies should bear the top part of the risk if they are to get the profits.

Second, I wish respectfully to suggest that the development and management of oil shale as a major energy resource requires the adoption in the Executive Branch of a completely new attitude toward management and utilization of public oil shale lands. The Department of Interior has mismanaged these lands for fifty years or more to the detriment of the public interest. The mismanagement is still continuing at the top levels even though drastic changes in the nation's energy situation call for complete reversals of policies toward public oil shale lands. The Congress must lead in the direction of better policies.

Permit me to sketch the problem in a few words.

From a superficial viewpoint, it would seem that public ownership of the oil shale lands now in the federal domain is firmly established. The Mineral Leasing Act of 1920 established the fundamental national policy that public lands containing oil, oil shale, and certain other minerals should not be disposed of outright, but should be leased. The Act withdrew oil shale lands from location of new mining claims--and permitted only leasing, subject to payment of bonuses and royalties. Moreover, in 1930, when the Oklahoma and Texas oil fields flooded the country with cheap oil, the oil shale lands were even withdrawn from leasing by a Presidential Executive Order (although it is being set aside for the recent "prototype" leases).

But, notwithstanding the 1920 law and the 1930 Executive Order, a large part of the oil shale lands in the public domain is still in danger of being "sold" to the oil companies and to speculators for $2.50 per acre, when such land is probably selling for $2,000-$10,000 per acre in the private market. The risk arises because a high proportion of oil shale lands in the Green River Formation in Colorado and in other states was plastered with so called "placer" mining claims in the years before 1920--and many of these claims are still being pressed by oil interests to get the oil shale lands away from the American people.

Fifty-five years after they were filed, these claims are only pretexts. Department of Interior files will show that many of these claims were filed solely for speculative purposes; many were not properly located and perfected to meet the discovery and other requirements of the mining law which obtained before 1920; practically all of them were probably abandoned in the 1930's and 1940's; necessary annual assessment work was not done; or they did not conform to the prudent man rule relating to mining claims in which the mining claimant is expected to be motivated by the prospect of a reasonable profit from mineral production. There was no bona fide oil shale producing industry. There still is no producing oil shale industry in the economic sense of being profitable. Only the gross failure of the Department of Interior to do its assigned job of serving as the steward of the public domain has kept these phony claims alive for 55 years--and they now still loom as a major threat to the public ownership of immensely large stores of energy.

The explanation of this riddle is that the Mineral Leasing Act of 1920 included a "savings clause" which reserved whatever valid rights there were in the preexisting oil shale mining claims.

When interest in oil shale claims dropped to a very low ebb with the discovery of the large petroleum producing fields in Oklahoma and Texas in the 1920's and the 1930's, many of the pre-1920 mining claims were simply abandoned. Rights to them could be bought in the 1930's and into the 1950's for a few cents an acre--because most of them really were simply "paper" claims initially and they became even more phony through abandonment in the years that followed.

As the energy picture started to tighten up after World War II many speculators and oil company "front men" acquired many of these "paper" claims. They began to breathe propaganda life into dead oil shale claims. The Department of Interior in those years did not care about oil shale land administration in accordance with law. The prevailing philosophy, promoted actively by certain members of Congress and their special interest supporters, was "to get the lands out into private ownership." Large blocks of oil shale lands were patented--that is title passed from the government to private ownership based on essentially fictitious mining claims--some of which were not only phony from the standpoint of a proper application of the mining laws but also may have involved fraud in location of the claims or in subsequent manipulations. Old General Land Office records will confirm what I am saying.

During the late 1920's and early 1930's the Interior Department staff had investigated many of the claims, contested them, and decisions were rendered declaring them "null and void" in whole or in part. However in the 1940's and 1950's the Department of Interior disregarded these earlier decisions--which should have been treated as final decisions--and actually patented tens of thousands of acres of such lands for $2.50 per acre. The giveaway forces triumphed in the Hoover administration when investigator Kelly was run out of the Interior Department, and they scored considerably throughout the 1940's and 1950's.

In the 1960's a major battle raged in the Interior Department, the Justice Department, and the Bureau of the Budget, and the White House on whether the pre-1920 claims were valid, and over whether erroneously disposed lands should be recovered. At stake were not only the recovery of past erroneous disposals of oil shale lands, but the potential disposal of many hundreds of thousands of additional acres of oil shale lands at the give away price of $2.50 per acre.

The outcome has never been firmly resolved, leaving a major blot on the record of the Federal government's handling of natural resources. Officials in those years behaved, in my opinion, as if they were hired by the oil companies rather than by the people of the U.S. My conclusion is that several Secretaries of Interior and their principal assistants failed to discharge their sworn obligations as public trustees of the public domain--in this case perhaps the richest domain that the United States has ever owned. Today this failure of administration still threatens large blocks of federal oil shale domain in Colorado which has a market value of up to $10,000 per acre or more with disposal at $2.50 per acre--and the creation of many instant millionaires.

Land giveaways are particularly hurtful to the citizens of Colorado because under proper Federal leasing or development programs the State of

Colorado would receive 37-1/2% of the proceeds and an additional 52-1/2% would go into the Reclamation Fund, a part of which would also redound to the benefit of Colorado. If the land is disposed to private oil companies at $2.50 per acre they will be the beneficiaries of all the profits, and the citizens of Colorado will hold a largely empty bag--and maybe even have to pay taxes to subsidize the development of the oil shale industry.

I have come here today to urge that the Congress of the United States forthwith launch a thorough oversight investigation of the Federal government's stewardship of the oil shale lands during the period 1920 to 1975. The purpose of this investigation would be to lay out the true story of what happened and to develop recommendations for a new national oil shale land policy which would be in consonance with the protection of the public interest. I believe the time is long past when the function of the Department of the Interior should be to shovel out public lands to private ownership. In an energy-short world the citizens of Colorado and the people of the United States as a whole should retain ownership and be the beneficiaries of whatever oil shale lands still remain in the public domain. The Department of Interior should honor valid rights in oil shale claims but it should be stopped from giving away any more oil shale lands based on phony pre-1920 claims and the Department of Justice should be ordered to recover oil shale lands erroneously disposed in the past.

This is a complex matter with a long history and big financial stakes, so the facts are not easy to nail down. I believe that a thorough, well-staffed investigation by the Congress would find that:

1. Pre-1920 mining claims, many of which were phony or even fraudulent, and a large part of which would be questioned if proper interpretation were placed on the pre-1920 mining laws, threaten a very large part of the rich oil shale lands in Colorado which remain in the public domain. Such claims could lead to the disposal of oil shale lands for a meager $2.50 per acre when such lands would sell for $10,000 per acre or more once patented. In short, of the 600-700 thousand acres of rich oil shale land in Colorado still owned by the Federal government, 300-400 thousand acres remain subject to this threat because claims filed 55 years ago have not been contested and declared invalid.

2. Some 300-400 thousand acres of rich oil shale land in Colorado have been converted to private or State ownership, including an estimated 264 thousand acres which were patented on the basis of mining claims. Of this latter total, somewhere between 30-100 thousand acres were patented in disregard of earlier Department of Interior decisions declaring the mining claims "null and void" in whole or in part. It should be noted that where fraud is involved the statute of limitations does not run until the discovery of the fraud,and the government may yet have legal remedies to recover the lands or their

values. In any event, the Congress needs to hold hearings to spur action on clearing up the clouds on oil shale titles and to determine what remedies should be sought by Justice and Interior on behalf of the people of the U.S. where lands were improperly disposed.

Let me make it clear that I do not recommend a governmental waiver of the rights to recover, because the interests which received the patents were unlikely, given the history of oil shale claims, to have clean hands.

Neither should the Federal government overlook the possibility of bringing action against Interior Department officials who failed to live up to their public trusteeship responsibilities. I think such action would instill a much higher sense of ethics in future servants of the people. The simple test is this: what right did these officials have to give away public property without the authority of law? I believe an investigating Committee will find that high officials were clearly warned about the existence of improper disposals.

3. The Department of Interior, particularly starting in the 1930's and up to the present time, has seriously mismanaged the public oil shale domain. It has failed to establish proper procedures for review of oil shale mining claims on which patent applications are filed; failed to check into the investigation reports and decisions of the 1920's and 1930's which were available in the Department and which showed that many mining claims were located for speculative reasons or even fraudulently and had been declared "null and void"; has written bad administrative and legal decisions which were politically pressured by the "user" interests or their representatives.

4. Department of Interior employees and officials in the Rocky Mountain region and in Washington, D.C., clear up to Secretaries of Interior, tended to disregard their clear statutory duties as stewards of the public domain and instead repeatedly approved specific mining claims, or established procedures for approval of such claims, or made legal decisions relating to such claims, which favored the claimants and hurt the general public interest.

5. Some Department of Interior officials and employees, soon after leaving Federal employment, were employed by oil companies or law firms which were engaged in sneaking the oil shale lands out of the public domain--and that some such employees or officials themselves entered into the business of buying the "paper" claims and attempting to convert them into patents at $2.50 per acre--actions which at a minimum had the appearance of conflict of interest.

6. Officials of the government, in the field and even in the Secretarial suites or in the Executive Office of the President, took actions and adopted policies which thwarted efforts by other government employees to stop the disposal of oil shale lands or to initiate recoveries of prior erroneous or illegal disposals--and that such actions were taken by means that were punitive and very likely fraudulent in some instances. A strong odor of coverup permeated the whole situation.

7. The Department of Interior, the Department of Justice, and the Executive Office of the President are still giving a very low priority to defending the public domain against oil shale mining claims which are more than fifty-five years old and in reality are only pretexts for getting the land out of the public domain. Multi-billion dollar issues and contests are being handled part time by a few people, with inadequate top level support. The public interest still has no real champion in the upper echelons of the Department of Interior on oil shale.

The foregoing points have been made in a spirit of public conscience in the hope that the Congress will mount a thorough investigation despite the almost certain violent pressures against it from the oil industry, the claimants, and the Federal agencies which have never revealed the scope of their default to the public. It should be noted that the files of the government in the Department of Interior (BLM and Solicitor), the Department of Justice (Division of Lands and Natural Resources), and the Executive Office of the President (OMB) contain much information on this seamy chapter in the mismanagement of this vital natural resource.

Third, I wish quickly to touch on a more recent stage in the disposal of rights to public oil shale lands. This is the so called "prototype oil shale leasing program" initiated by former Secretary Stewart Udall and being run by the Nixon-Ford administrations.

Under this program four very rich 5,000 acre tracts of oil shale land, two in Colorado and two in Utah, have been put out on long term leases. Additional tracts for "in situ" extraction have been "nominated" by private oil companies and are currently in process of being processed for "leasing."

Inasmuch as the first lease in Colorado brought more than $210 million or $41,320 per acre in possible future bonus payments, the people of Colorado may think that this was a "good deal."

I question the wisdom of the new "leases." The Colorado tract C-a contains between 4 billion and 6 billion barrels of potential shale oil, depending on how the calculation is made. This means that the seemingly enormous bid by Standard Oil and Gulf Oil amounts to only 3-1/2 cents to 5-1/4 cents per barrel for potential oil which would be worth $11.00 or so a barrel if it could be gotten out of the ground at the present time--and which is certainly likely to increase in value as the years go by.

Tract C-a contains potential oil which would have a gross value of as much as $44 billion or even $66 billion. Against these figures the possible bonus payment of $210 million is picayunish--between 3/10 and 5/10 of one percent. It is no wonder that Congressman John Dingell in 1974 circulated estimates that the rights to this tract might already be worth $1.5 billion. The Department of Interior had originally estimated $9 million--a horrible underestimate.

The "prototype leasing program" is questionable from several standpoints:

1. The government is "leasing" rights to many 5,000 acre tracts of its very rich oil shale land before a commercial and economic process has been developed and before the true value of the oil is known. Every oil company will demand a tract the way things are going.

2. The 300-400 thousand acres of oil shale land now in private ownership probably contain somewhere between 100-300 billion barrels of potential oil--equal to from three to nine times all the oil in known U.S. liquid petroleum reserves. While I can understand the desire of the major oil companies to hog the richest oil shale reserves in the public domain, from a public point of view it would seem that the 214,000 acres which they already own, even assuming 100,000 acres might be recovered by the U.S., should provide them enough opportunity for developing extractive processes and demonstrating the viability of the oil shale industry.

3. There is the shocking example of an Occidental Oil Company lobbyist pressuring President Ford last summer at Vail to visit the Company's diggings in the area and then coming out of the meeting with the President at the site with word that the President was going to expedite leasing of additional tracts of oil shale lands, according to reports in Colorado newspapers. Inasmuch as Occidental's bids in earlier competitions had been only a fraction of the winners' bids on the two tracts on which the company had competed, this suggests a corporate request for a government "handout" of oil shale land. It is shocking to consider that the President engaged in "instant decision making" and went along with such a request--which the Department of Interior is now processing. Nominations were closed in September.

In the context of this situation I strongly urge that the Congress, at the earliest time, investigate the "prototype leasing program" as well as the earlier "sodium" leasing program that covers oil shale lands. Otherwise, the people of the United States will find that for a billion dollars or so the oil companies will have locked up the richest oil shale lands in the U.S. containing oil potentially worth trillions of dollars with the full cooperation of an Executive Branch which does not seem to know what it is doing. Clearly, it cares not for the next generation.

Fragmentation of the Federal government's organizational responsibility for oil shale lands and their development has become a real problem in the last four years. It affects all three issues discussed above. In the Executive Branch the Federal Energy Administration and the Energy Research and Development Administration (neither of which existed a few years ago), push for development, probably without knowing the oil shale lands mess created earlier by the Department of Interior. The OMB is also involved. In the Congress there is even greater fragmentation. Effective protection of the public interest becomes a challenge, since the oil companies came close to ranking as the fourth branch of the government.

In closing let me again thank you for creating an opportunity for citizens of Colorado to express their views on vital energy matters which will affect Colorado and this whole nation for decades. You have taken a good step in bringing government closer to the people in the best sense.

I hope, also, that environmental and public interest research groups will follow the leads I have given. Under the Freedom of Information Act they can search the files of the agencies and uncover additional facets of this story of incredible mismanagement.

OVER

MICHAEL S. MARCH

Vitae

Michael S. March was born in 1916 and reared on his father's homestead in Kiowa County, Colorado.

His higher education includes a B.A. degree in Economics from the University of Colorado; study at the University of Illinois and at American University in Washington, D.C.; and a Ph.D. in Political Economy and Government from Harvard University. From 1969-70 he was a Federal Executive Fellow at the Brookings Institution, doing research on national priorities and the Federal budget.

Dr. March served for 33 years with 8 different Federal agencies, including approximately 28 years with the U.S. Bureau of the Budget and the Office of Management and Budget in the Executive Office of the President. In 1967 he was awarded the Bureau of the Budget's Award for Exceptional Service, its highest distinction for professional service. He retired from Federal service in 1973.

Dr. March has engaged in legislative and program analysis in a wide range of fields, including national defense, international aid, education, labor and manpower, science, and income maintenance and retirement programs. He is the author of numerous articles in professional journals on subjects such as budgeting, poverty, human resources development, and service delivery systems. He has contributed to more than 20 Presidential Budget Messages and directed or written many other governmental reports and publications.

During 1973-74 he was Assistant Vice President (Budget and Planning) at the University of Colorado Medical Center. Since September 1974 he has served full-time as Professor of Public Affairs in the Graduate School of Public Affairs of the University of Colorado at Boulder.

His address is 2605 Stanford Avenue, Boulder, Colorado 80303. His telephone is 303-494-4871.

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October 29, 1987

The Honorable John Melcher, Chairman
Subcommittee on Mineral Resources and Development
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman,

Thank you for the opportunity to submit for the Subcommittee record the views of the Sierra Club regarding the ongoing controversy over the Department of Interior's handling of pre-1920 oil shale claims.

As you are aware, we have supported legislation offered in both houses, both last Congress and this Congress, to prevent the government's invidious settlement of the Tosco case and, once that settlement became a fact, to avert any further giveaways of public oil shale lands under other equally spurious claims (H.R.5399, 99th Congress, and H.R.1039, 100th Congress). We have enclosed our statements on that legislation for the Subcommittee's record.

We support your effort to place a moratorium on any further patenting of oil shale claims pending further Congressional action.

As a basis for such action, we believe it would be useful for the Subcommittee to request, from the General Accounting Office or some other appropriate investigative and auditing agency, a comprehensive review and investigation of the government's past handling of oil shale claims.

Such a review should provide valuable information on the past disposals and present status of all oil shale claims, as well as on the legal validity of previous Interior Department decisions concerning this issue. The review should also evaluate the thoroughness and consistency of the Department's past efforts to invalidate oil shale claims, as a basis for a clear Congressional mandate for future challenges. Finally, the review should analyze both the economic implications of past disposals and the consequences of these actions in terms of the pursuit of our overall national energy and public lands policies.

We believe that there should be two guiding principles for any Congressional action governing future administration of oil shale claims. First, all such claims should be subjected to the most aggressive and thorough administrative challenge, and no right based on any claim should be recognized unless it has survived such a challenge.

Second, any right which does survive an aggressive and thorough challenge should be circumscribed, to the extent that is possible under the law and the constitution, in order to assure that lands are not disposed for purposes other than intended in the General Mining Law. To that end, no

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

further patents should be granted, and any development rights recognized after challenge should be effected through a leasing program which includes stringent protections for the public interest in the lands, including diligence terms, royalty provisions, reclamation requirements and other environmental protections.

The lack of success in upholding challenges to oil shale claims which has characterized the Department of Interior's record to date should not be taken as an indication that such challenges are futile, but rather as a demonstration of the need for specific Congressional guidance in future efforts. The thoroughness and tenacity of the Department in these matters can obviously not be taken for granted. Congress should instruct the Department as to the bases on which claims are to be adjudicated, and Congress should demand a coordinated and complete effort and should provide the Department with sufficient funds to ensure that there is no excuse for not doing the job. The bases for adjudication should include, but not be limited to, loss of discovery due to changing economic circumstances, improper or fraudulent location, use of dummy locators, location for non-mining purposes, failure to perform annual assessment work, failure to do $500 of improvements on each claim, adverse possession by the government, failure to develop the claim for mining in a reasonable time, abandonment of the claim, issuance of conflicting patents, invalidity of the claim as of Feb. 25, 1920, land of no clear value for oil shale, lack of foreseeable prospects of marketability, and whether the claims were previously nullified.

Thank you once again for the opportunity to present these views for the committee record.

Sincerely,

Brooks B. Yeager

Brooks B. Yeager
Washington Representative

cc: Maggie Fox, Kirk Cunningham,
Mark Pearson

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STATEMENT OF BROOKS B. YEAGER

REGARDING H.R. 1039

LEGISLATION TO AMEND SECTION 37 OF THE MINERAL LANDS LEASING ACT OF 1920

RELATING TO OIL SHALE CLAIMS

BEFORE THE HOUSE MINING AND NATURAL RESOURCES SUBCOMMITTEE

HONORABLE NICK J. RAHALL, CHAIRMAN

MARCH 3, 1987

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

Mr. Chairman, Members of the Subcommittee,

Thank you for the opportunity to present the views of the Sierra Club on the legislation before you today. I am Brooks Yeager; I am the Club's Washington Representative on issues of Federal energy and natural resources policy. The Sierra Club is a national volunteer organization with over 400,000 members dedicated to conserving our natural resources and enhancing the quality of the human enviroment.

As you know by our testimony last September in support of H.R. 5399, the Sierra Club supports speedy and thorough Congressional action to clean up the oil shale mess at the Department of the Interior and to prevent any further giveaways of our nation's public lands. I will not repeat the detailed arguments we gave at that time concerning the dismal history of the Department's handling of oil shale claims. It is apparent, however, that without precise Congressional guidance, the Interior Department will remain unwilling and perhaps also unable to take the kind of aggressive action required to extinguish invalid oil shale claims and to regain control of the public lands it is obligated to administer.

It is also clear that the problem presented by the pending oil shale claims, while urgent, is not unique. I would first like to address some of the more general defects in the 1872 Mining Law itself which, while they may be illustrated in the historic mismanagement of the nation's oil shale lands, are not limited to them. Then I will turn to the legislation under consideration today.

DEFECTS OF THE 1872 MINING LAW:

The 1872 Mining Law is the only one of the nation's public lands statutes which continues to encourage the outright disposal of the public lands by allowing the patenting of claims. Although the alleged purpose of this practice is to encourage mining, the law has been, and continues to be, subject to rampant abuse by individuals and companies who have little apparent intention of developing the mineral resource. Additionally, the law contains no requirements for the reclamation of lands scarred by those mining activities that do take place, and Federal land managing agencies have shown themselves ill-prepared to prevent such environmental abuses under the authorities conferred by other statutes. (See the recent GAO Report, Interior Should Ensure Against Abuses from Hardrock Mining, March 1986).

The Sierra Club has long been on record advocating the general reform of the Mining Law and its replacement with a leasing system which would better protect the environment as well as the nation's financial interests. We continue to advocate such a comprehensive reform.

As long as public land minerals continue to be staked, claimed, and patented under the Mining Law, the American public will continue to lose the revenue which it is properly due for the exploitation of public minerals. Noone claims that the nominal fees paid to the government represent a fair return to the public - they obviously do not. Disposal by claim and patent was formerly justified on the basis that it would encourage the development of the mineral resource and that it would aid in the settlement of the sparsely populated West. The first of these claims is, in the present context, demonstrably false; and the second is no longer a goal of national public policy.

The absence of any real social utility to the system of "patenting" mining claims, and indeed the obsolescence of the Mining Law itself, has been evident since before the days of the Public Land Law Review Commission. Interior Secretary Rogers C. B. Morton eloquently described the situation in testimony supporting the Nixon Administration's effort to replace the 1872 Mining Act with a mineral leasing system:

> Under the Mining Law of 1872 a person can file a claim for minerals on lands with almost no restrictions. The claim is an exclusive right to the hardrock deposits on the land, it may exist indefinitely, and the claimant need not show proof of a mineral discovery unless challenged by the Federal Government. If the

> claimant does show proof of a discovery, he is entitled to a patent for a nominal fee, and is under no obligation to ever produce minerals from the land. It is evident that the quantity of minerals produced from land subject to mineral patents and claims falls short of the potential those lands have for production. Furthermore, there is substantial evidence of activities on mineral claims and patents totally unrelated to mining... present laws do not always insure a fair return to the public for the disposition of its natural resources... (under the Mining Law) the public receives almost no revenue for potentially rich mineral land... We recognize that this law was not enacted to generate Federal revenues, but it has outlived its need.
>
> (Hon. Rogers C.B. Morton, Secretary of the Interior, in Mineral Development on Federal Lands, Hearings before the Subcommittee on Minerals, Materials, and Fuels, of the Committee on Interior and Insular Affairs, United States Senate, 93rd Congress, March 27, 29 and April 2, 1974, pp. 165 ff.)

As this 13 year old statement indicates, there is ample evidence that a Congressional ban on further hardrock mineral patents would improve the operation of the Mining Law, and discourage the abuse of the claims process by those whose intent is to develop surface, rather than mineral resources. Just as a footnote to this discussion, it may be interesting for the Subcommittee to note that the Sierra Club endorsed the legislation advocated by Secretary Morton, which was introduced in the 93rd Congress by Chairman Scoop Jackson as S.1040.

In addition to the general defects of the patenting system, the operation of the Mining Law places Federal land managing agencies in a reactive posture that virtually insures controversy and environmental damage from unplanned mining development on sensitive lands. An example of this problem which is likely to become highly visible soon concerns the threat to one of our greatest national treasures, the Grand Canyon, posed by the mining of uranium claims near the Park.

There are now three operating uranium mines on the north side of the Grand Canyon and several more are being proposed for both the north and south side. While the Grand Canyon National Park itself is off-limits to mining, contiguous Forest Service and BLM land is open for exploration and development.

Unfortunately, the Park boundaries park do not include all of the Grand Canyon, nor do they include the watersheds of the Colorado River tributaries. One particular mine proposed near the south rim of the canyon is at the top of the watershed for Havasu Creek, which is the lifeblood for the Havasupai Indian Tribe below as well as being a popular backcountry attraction for Park-area visitors.

Problems associated with these mines include the potential industrialization of the remote and scenic Grand Canyon area, the threats to key watersheds posed by the radionuclide and heavy metal pollution traditionally associated with uranium mining and milling, and the cumulative impacts of the mines, roads and associated activities on wildlife habitat, recreation and Indian cultural sites.

Conservationists and the Havasupai Tribe have tried to restrict mining in certain sensitive locations and have sought to control the pace and extent of development elsewhere, but so far with little success. The BLM and Forest Service argue that they are unable to deny or control mining operations initiated under the Mining Law, and they further claim they are incapable of assessing the cumulative impacts of such mining - a step which has been called for by conservationists. The agencies have failed to identify and withdraw sensitive areas, and their enforcement of operation and reclamation standards has been inconsistent and far from diligent.

A related problem has arisen in the Alaskan National Parks where, because of the systematic failure of the Park Service to make validity determinations or to undertake environmental assessments before approving mining operations on claims, many environmentally damaging placer mining operations are now being conducted in such Parks as Denali and Wrangell-St. Elias. Many of the mines operate in gross violation of applicable water quality standards: according to recently-filed court documents, twenty miles of streams in Denali National Park have been torn up without reclamation.

By law, mining in Alaskan National Parks can only be conducted pursuant to valid existing rights existant as of the enactment of the Alaska National Interest Lands Conservation Act in 1980, or in some cases, as of the "d-2" withdrawals of 1972. Although internal Park Service records indicate that many of these claims could be successfully challenged as invalid, the Park Service has no systematic program for making such challenges, and in fact approves mining claims without even reviewing questions of validity in most cases. The Sierra Club has sued to require the Park Service to make validity determinations prior to approving mining operations, and has also sued, and won a preliminary injunction, to require more systematic environmental review of proposed mining operations on Alaska park lands.

It is difficult to argue that these complex and interrelated problems can be resolved withoug a general reform of the Mining Law.

THE OIL SHALE SCANDAL AND H.R.1039:

Despite the evident bankruptcy of the Mining Law from the point of view of mineral, environmental, and fiscal policy, we recognize that it is unlikely that a general legislative reform can be accomplished on a schedule which will allow the timely resolution of the crisis affecting our shale lands. For that reason, we support the effort of Chairmen Rahall, Udall, and Vento, and Representative Campbell, to deal directly with some of the specific problems that have arisen in the case of the oil shale claims.

We support the basic intent of H.R.1039 to bar further patenting of pre-1920 oil shale claims, which, if determined to be valid, would otherwise be patentable under the so-called "savings clause" of the Mineral Lands Leasing Act.

Although we agree, in principle, that "valid" oil shale claims which are prevented from patent by this legislation should be convertible into leases, there are two potential problems with the mechanism established in H.R.1039 for allowing such a conversion. First,the legislation does not offer any help in clarifying what might be considered a "valid" claim. In the view of many of the most seasoned observers of the Department's handling of oil shale, there may in fact not be any "valid" pre-1920 oil shale claims. Second, the legislation does nothing to insure that leases established by conversion of any "valid" claims which might exist return fair value to the public for the use of its oil shale resources.

It seems clear that the Congress can constitutionally bar the issuance of patents on claims for which a complete and valid application has not been made. Such a bar would not contravene a "valid existing right," which vests only when all procedural steps to patent are completed.

In addition, Congress could direct the Secretary of the Interior to mount a systematic challenge to the validity of the remaining oil shale claims, with the intent to require an aggressive examination leading to the extinguishment of dormant claims. As has been noted in the context of the Tosco settlement, many of the oil shale claims now pending were initiated based on invalid discoveries, or were obtained by fraud and manipulation, or have never received the required annual assessment work. We believe the Committee should do everything within its power to ensure that such claims are not rewarded, whether with leases or patents.

To the extent that the validity of specific claims is established after such a rigorous examination, allowance can legitimately be made for their conversion into leases under Section 21 (30 U.S.C. 241). However, provisions should be added to insure that such leases are granted for a primary term of no more than twenty years; that the production royalties on leases be set at a figure consistent with the minimum royalties for surface mined coal; that the annual rental in lieu of production be set at a figure commensurate with the lost opportunity costs of the land in question; and that bonding and other requirements for reclamation are stringent enough to ensure the full reclamation of any mined properties.

Finally, we believe that the "Findings" Section of the legislation should include an explicit repudiation of the Interior Department's decision to settle the Tosco claims. It would be unfortunate if legislation such as this, intended to prevent further giveaways of oil shale lands, were to be interpreted as implicit Congressional consent to that unfortunate settlement.

Tnank you once again for the opportunity to testify before you today.

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STATEMENT OF BROOKS B. YEAGER

WASHINGTON REPRESENTATIVE

CONCERNING H.R.5399

LEGISLATION TO AMEND SECTION 37 OF THE MINERAL LANDS LEASING ACT OF 1920

WITH REGARD TO OIL SHALE CLAIMS

BEFORE THE HOUSE SUBCOMMITTEE ON MINING AND NATURAL RESOURCES

HONORABLE NICK J. RAHALL, CHAIRMAN

SEPTEMBER 11, 1986

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

Mr. Chairman, Members of the Subcommittee,

Thank you for the opportunity to present the views of the Sierra Club on the legislation before you today. My name is Brooks Yeager; I am the Club's Washington Representative on issues related to national energy policy. The Sierra Club is a national volunteer organization with over 378,000 members dedicated to protecting our natural resources and improving the quality of the human environment. Although the environmental concerns of Sierra Club members have broadened since the Club's founding by John Muir in 1892, our interest in the careful management of America's splendid public lands has remained an essential element of our conservation efforts through the years.

First, Mr. Chairman, I hope you will allow me to express our thanks for your determination and persistence in examining the Administration's policy reversal on oil shale since the proposed settlement in Tosco v. Hodel was revealed late last month. Thanks to your efforts, and those of Chairmen Seiberling and Udall, and despite the Administration's efforts to the contrary, the Interior Department's intent to effect the quiet disposal of hundreds of thousands of acres of public lands has been thrown open for public examination and Congressional debate.

In fact, the legal settlement executed late last month with the consent of the Interior Department represents an extraordinary reversal of 25 years of public land policy. The settlement irrevocably transfers, for nominal payments, over 82,000 acres of the public's land -- almost 130 square miles -- to Exxon, Union Oil, Tosco, Phillips Petroleum, and several other energy corporations. These corporations had sued to patent pre-1920 oil shale claims on the land, and, despite the fact that the claims had in many cases been fraudulently initiated and inadequately maintained under the law, the suit had succeeded at the district court level.

Although the thrust of my comments will be concerned with the provisions of H.R. 5399, I think it is useful to review the Tosco settlement, and the Administration's defense of it, in order to understand the context of, and the need for, the legislation.

The settlement itself, even measured against the uncertain prospect of reversing the Finesilver decision on appeal, hardly matches the rosy portrait of it painted by Assistant Secretary Griles at your August 12 oversight hearing. Although Mr. Griles carefully and exhaustively catalogued the rights retained by the government in regard to the patented claims, he neglected to inform the Committee that those rights were in most cases so drastically qualified that their successful enforcement is hard to envision. For instance, although the government retains rights to oil, gas, and coal on the claims, those rights are all subservient to the claimant's right to develop the oil shale resource. Another reservation listed, the right of present grazing licensees to continue grazing on the claims, is actually nonexistent, depending entirely on an unenforceable statement of the "present intent" of the claimants to continue to allow it. Finally, the settlement contains absolutely no guarantee that these lands, once granted to the claimants, will ever be used for oil shale development, nor does it retain any residual Federal authority to ensure adequate environmental protections in connection with whatever development may occurr. Even if the government had appealed the Finesilver decision and lost on every count, the result would not have been appreciably worse.

The conduct of the settlement has been, if anything, more reprehensible than the settlement itself. In the face of profound internal dissension, the Interior Department chose to silence its most knowledgeable field officers and override their recommendations to continue challenging the claims. The Department not only failed to pursue legal remedies urged on it by its own regional solicitors; it also completely neglected any chance for legislative relief. It deliberately avoided consulting with the Congress. It deliberately kept the public in the dark. When the proposed settlement was finally revealed through documents leaked to the press, and in direct response to expressions of concern from the proper Committees of jurisdiction, the Administration rushed the settlement through in order to avoid "Congressional interference."

In excusing its unwillingness to challenge the claims, the Department asserted that it stood to lose any appeal, and that the precedential effect of an affirmed Finesilver decision would imperil the government's ability to challenge other mining claims. However, settlement or no, the decision is already in the *Federal Supplement*, and there are numerous other claims that raise similar issues, many of which may be decided by the same court. Additionally, Department spokesmen have already made it clear that *they intend to use this settlement as a precedent* for giving away up to 450 additional square miles which are covered by other oil shale claims.

The fact is, this Administration is all too eager to embrace every opportunity to dispose of the public land trust, as its failed "privatization" program has made clear. Secretary Hodel apparently intends to record his place in history as the man who did for ideology what Albert Fall did for money. Unless he is stopped by Congress, the Interior Department will continue to abuse the public trust by giving the land which belongs to all Americans to speculators and corporations who hope to make a profit from it. It is critically important for Congress to reassert its authority in this area, and to direct the Administration in no uncertain terms to protect the public interest in these lands.

H.R.5399 represents a good first step in such a process, and for that reason, the Sierra Club strongly endorses it. The basic effect of the enactment of H.R.5399 would be to clarify the original intent of Congress that the disposition of public lands under the mining laws encourage the actual production of minerals for the public good. With particular regard to oil shale claims which date from the period before the enactment of the Mineral Lands Leasing Act in 1920, when oil shale became a leasable, rather than a locatable mineral, the bill would amend the so-called "savings clause" of that Act to make clear that only claims on which annual assessment work has been performed fully and completely would qualify for patent under the law. This clarification should go a long way towards resolving the ambiguities of legal interpretation on the issue of what constitutes annual assessment which have resulted from contradictory administrative policies and divergent Supreme Court interpretations in the past.

It also makes sense. The era in which American public policy encouraged the disposition of public lands for the general purposes of settlement and development effectively ended 52 years ago with the Presidential withdrawal of public domain lands following the passage of the Taylor Grazing Act. Since that time, the only statute which encourages the disposal of public lands has been the Mining Law, where disposal is encouraged for the sole purpose of contributing to the expeditious development of the nation's mineral resource. The wisdom of granting outright title to the public lands, even for such a specific purpose, is certainly open to doubt. The Sierra Club, for one, has long been on record advocating the general reform of the Mining Law and its replacement with a leasing system which would better protect the environment as well as the public's financial interests. Without getting into such larger questions, however, it is abundantly clear that the disposition of mineral lands in a manner which does not encourage mining confers no public benefit whatsoever.

The specific intent to encourage mineral development has been imperiled by conflicting court decisions on the questions of what constitutes valid discovery of minerals and what level of assessment work is adequate to retain a claim under the law. The confusion on these points is amply demonstrated by the Administration's own testimony. Yet, without meaningful thresholds on both these points, the Mining Law may once again become a mechanism for the general disposal of the public lands.

This Administration clearly has little interest in solving this problem. They have not looked for a legal remedy, nor have they sought a legislative solution. And now that a solution has been offered, they have indicated they will oppose it. So be it. Congress protected the public interest against James Watt's indiscriminate coal leasing program in 1982, and Congress is fully capable of protecting the public interest in its oil shale lands as well.

Although the Sierra Club fully supports H.R.5399, we have some suggestions on ways in which the bill might be strengthened so as to prevent any further giveaways of oil shale lands, and, if possible, to reclaim the 82,000 acres transferred by virtue of the Tosco settlement.

First, we recommend that the Committee consider adding language to the legislation directly extinguishing all claims for which the procedural steps which make the claimant eligible for patent issuance have not been fully completed. Such language would constructively obligate the Interior Department to begin an agressive examination of all pending claims, and would effectively bar speculators and other claimants who have lain dormant from hopping on the Finesilver bandwagon. In order to make the language fully effective against last minute speculation, the Committee should set a retroactive date from which the bar would be effective.

Second, we recommend that the Committee consider clarifying what constitutes a "valuable mineral deposit", and therefore a valid discovery, in the case of oil shale. Although the Supreme Court has held that oil shale claims, as opposed to hardrock claims, need only be "prospectively valuable" in order to be worthy of patent, the term "prospectively valuable" has never been adequately defined. Without such a definition, any claim which overlies any oil shale formation of whatever quality may be considered "valuable" in some future oil market. We believe that the term should be defined in such a way that a prudent person, diligently developing a claim, could expect to market shale oil for a profit.

Third, we recommend that the Committee consider adding a provision to the bill which would expressly instruct the Attorney General to seek nullification of the Tosco claims under the provisions of Section 37 as amended by this bill. Such a provision would avoid raising the "taking" problems which might arise if Congress directly extinguished the claims itself. Although the chances of success would be uncertain, such a course of action at least offers the prospect of reclaiming the lands given away in this unfortunate settlement.

Defenders of the Tosco settlement will undoubtedly criticize your bill, and these other potential courses of action, as an unfeeling effort to wrest from the various oil shale claimants rights which they argue they are due under present law. But before we spend too much energy agonizing over the fate of the claimants, perhaps we should take a look at who they are and how they acquired the claims which they now wish to patent.

Most pending oil shale claims are held by major energy corporations, including Exxon, Unocal, Tosco Corporation, and Phillips Petroleum. The claims not held by these corporations are, for the most part, held by speculators who hope to sell them to major energy corporations once they are assured of a patent. Few if any of the claims, as far as I am aware, are held by the original claimant. Many of them have in the past been challenged and nullified by the Department for fraudulent discovery, dummy location, or lack of assessment work. Many of them were acquired by their present owners through such shady practices as "advertising out" — buying one eighth of a claim as part of an estate or otherwise, usually from someone who had no idea of its potential value, and then perfoming $100 worth of assessment work and forcing other claimants to forfeiture without their knowledge. None of the claims have experienced any serious development effort in the last 66 years.

As for the individual speculators, Chris Welles, in his excellent book The Elusive Bonanza, describes a typical claims scenario:

> Between 1954 and 1957, according to Interior Department records, he obtained through forfeiture at costs as low as 3.9 (cents) an acre an interest in at least 221 unpatented claims covering 35,040 acres. In 1964, he signed an agreement with Shell Oil giving it the option to buy one 21,120 acre block for $42,240,000, or $2,000 an acre, if (he) were able to obtain patents

> on the land. Shell agreed to pay all the litigation costs, up to $130,000 a year, and pay (him) an annual retainer of $50,000 plus a maximum of $100,000 in research fees. (He) also... sold a plot of 16 unpatented claims to The Oil Shale Corporation for $1,536,000 in 1964 and made a deal on additional acreage for an option for which Tosco pays him $148,000 annually..."

We aren't talking about pick and shovel miners here -- what we really have going is a corporate market in paper claims, claims available from the goverment for a pittance for a mineral resource which is not presently commercial but which someday may be invaluable. Sixty years of backdoor maneuvering, clever legal strategies, and supine administration have performed a miracle in which these paper claims have turned into "rights" which we are told it would be unfair to abolish. The treatment of these claims -- and the treatment of the public interest in its oil shale resources -- has indeed been a scandal, a scandal of which the Administration's Tosco settlement is just the latest chapter.

The Administration's oil shale giveaway points once again to the need to reform the mining law itself -- the last remaining statute which actively encourages the irrevocable disposition of public lands into private hands. The questions raised by pending oil shale claims clearly deserve to be re-opened in the context of other mineral claims. The question of the viability of the location system for any mineral at all deserves a full examination. Clearly, such a comprehensive project is clearly not possible in the time remaining in this Congress.

Pending the resolution of these other issues, H.R.5399 will clarify the intent of Congress that only claims on which annual assessment work is performed are perfectible under the present law. This modest clarification will help prevent any further administrative giveaways on the remaining oil shale claims, and is worthy of expeditious passage.

Thank you once again for the opportunity to testify before you today.